Burndy, LLC *and* Glass Molders, Pottery, Plastics & Allied Workers Local 39B.

Burndy, LLC *and* IUE-CWA, Local 485. Cases 34–CA–065746, 34–CA–078077 and 34–CA–079296

August 17, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND MCFERRAN

On July 31, 2013, Administrative Law Judge Lauren Esposito issued the attached decision. The Respondent filed exceptions, a supporting brief, and a reply brief. The General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record[1] in light of the exceptions and briefs[2] and has decided to affirm the judge's rulings, findings,[3] and conclusions and to adopt the recommended Order as modified.[4]

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[1] On November 18, 2015, General Counsel Richard F. Griffin, Jr., issued a Notice of Ratification in this case. On that same date the General Counsel filed a copy of the Notice of Ratification with the Office of the Executive Secretary along with a letter requesting that the Notice of Ratification be placed in the case record. The Notice of Ratification states, in relevant part:

> I was confirmed as General Counsel on November 4, 2013. After appropriate review and consultation with my staff, I have decided that the issuance of the complaint in this case and its continued prosecution are a proper exercise of the General Counsel's broad and unreviewable discretion under section 3(d) of the Act.
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> For the foregoing reasons, I hereby ratify the issuance and continued prosecution of the complaint.

On December 7, 2015, the Respondent filed an Opposition to Notice of Ratification challenging the General Counsel's request to have the Notice of Ratification added to the case record. Procedurally, the Respondent moves to strike the Notice of Ratification from the case record, arguing that there is no authority in Administrative Procedures Act, 5 U.S.C. §556(e), or the Board's Rules and Regulations for adding the ratification to the record. In the alternative, the Respondent requests that its opposition be made part of the case record.

Having duly considered the matter, pursuant to Section 102.48(b) of the Board's Rules and Regulations we grant the General Counsel's request that the November 18, 2015 Notice of Ratification be made part of the case record, and we grant the Respondent's alternative request that its opposition be made part of the case record as well.

[2] The Respondent argues that the authority of the General Counsel and Regional Director to investigate and prosecute this case lapsed during the period when the Board lacked a valid quorum. We reject that argument for the reasons stated in *Bloomingdale's*, *Inc.*, 363 NLRB No. 172, slip op. at 2 fn. 4 (2016) (General Counsel's authority derives from the Act, not from power delegated by the Board), and *Pallet Cos., a subsidiary of IFCO Systems, N.A., Inc.*, 361 NLRB No. 33 (2014) (Agency staff engaged in prosecution of unfair labor practices are directly accountable to General Counsel).

The Respondent also argues that the investigation and prosecution of these cases is invalid because former Acting General Counsel Lafe Solomon was not properly appointed under Federal Vacancies Reform Act (FVRA), 5 U.S.C. §§ 3345 et seq. For the reasons stated in *The Boeing Company,* 364 NLRB No. 24, slip op. at 1 fn. 1 (2016), we find that Solomon was validly directed by the President to serve as Acting General Counsel. See also *Hooks v. Kitsap Tenant Support Services, Inc.*, 816 F.3d 550, 556–557 (9th Cir. 2016); *SW General, Inc. v. NLRB*, 796 F.3d 67, 73 (D.C. Cir. 2015), cert. granted , 136 S.Ct. 2489 (2016) (mem.).

We acknowledge that the decisions in *Kitsap* and *S.W. General* also held that Solomon lost his authority as Acting General Counsel on January 5, 2011, when the President nominated him to be General Counsel. *Kitsap*, 816 F.3d at 558; *SW General*, 796 F.3d at 78. Although that question is still in litigation, we find that General Counsel Griffin's ratification of the issuance and continued prosecution of the complaint in this matter has rendered moot any argument that Solomon's alleged loss of authority after his nomination precludes further litigation in this matter.

The Respondent challenges the merits of the General Counsel's ratification on the basis that (1) the FVRA violation is a non-harmless error; (2) the FVRA violation is a structural error that cannot be cured by de novo review; (3) the General Counsel's ratification was perfunctory, and the "invalidly-issued complaint" prejudiced the Respondent; (4) neither the APA or the Board's Rules vests the General Counsel with authority to cure an invalidly issued complaint; and (5) ratification so long after the issuance of the complaint and the hearing effectively makes the ratification "fruit of the poisonous tree." We reject these arguments for the reasons set forth in *American Baptist Homes of the West d/b/a Piedmont Gardens*, 364 NLRB No. 13, slip op. at 9 fn. 19 (2016).

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In the absence of exceptions, we affirm the judge's findings that the Respondent unlawfully maintained an overbroad public statements policy and no-solicitation rule and her dismissal of allegations that the Respondent unlawfully: (1) prohibited employees from discussing terms and conditions of employment; (2) through Plant Manager Ed Marczyszak, threatened employees with unspecified reprisals; (3) through Director of Human Resources William Lochman, threatened to "come down hard" on Charging Party Glass Molders, Pottery, Plastics, and Allied Workers Local 38B; (4) engaged in surveillance; (5) refused to allow Charging Party IUE-CWA, Local 485 to use the office photocopier and refused to contribute to the cost of printing the IUE contract booklet; and (6) maintained a group assets protection policy and dress code.

[4] In accordance with our decision in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), we shall modify the judge's recommended tax compensation and Social Security reporting remedy and modify the recommended Order and substitute a new notice to reflect this remedial change. We shall also modify the recommended Order and notice to conform to our decision in *Durham School Services, L.P.*, 360 NLRB No. 85 (2014).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Burndy, LLC, Bethel, Connecticut, its officers, agents, successors, and assigns shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs.

2(b) Compensate Robert Sears for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 34, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. August 17, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT apply a rule against talking during worktime to prohibit conversations about the International Union of Electronic, Electrical, Technical, Salaried and Machine Workers, IUE/CWA (IUE) or the Glass Molders, Pottery, Plastics & Allied Workers International Union (GMP), when we permit employees to talk about other nonwork-related matters.

WE WILL NOT threaten you with discipline in retaliation for your support for or activities on behalf of the GMP.

WE WILL NOT threaten you with unspecified reprisals in retaliation for your support for or activities on behalf of the GMP.

WE WILL NOT create the impression that your activities on behalf of the GMP are under surveillance.

WE WILL NOT maintain a public statements policy which prohibits employees from responding to media inquiries without prior approval, and limits which employees can respond to media inquiries.

WE WILL NOT maintain a general rule violation which prohibits solicitation for any unauthorized purpose on company time.

WE WILL NOT harass you in retaliation for your activities on behalf of the IUE.

WE WILL NOT discipline you because you engage in activities on behalf of the IUE or GMP.

WE WILL NOT suspend you because you engage in activities on behalf of the IUE.

WE WILL NOT disparately apply our general rule 9 prohibiting loafing or other abuse of time to you in retaliation for your activities on behalf of the IUE or the GMP.

WE WILL NOT impose more onerous working conditions on you or monitor you in retaliation for your activities on behalf of the IUE.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above

WE WILL make Robert Sears whole for any loss of earnings and other benefits suffered as a result of his suspension on May 29, 2012, less any net interim earnings, plus interest.

WE WILL compensate Robert Sears for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 34, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the following discipline issued to the named employees, and within 3 days thereafter, notify them in writing that this has

been done and that the discipline will not be used against them in any way:

Robert Sears	February 3, 2012 counseling
Thomas Norton	February 10, 2012 counseling
Daniel Domeracki	February 10, 2012 counseling
Michael Cavaluzzi	February 10, 2012 counseling
Michael Vaast	February 13, 2012 counseling
Robert Sears	April 12, 2012 verbal warning
Robert Hing	April 12, 2012 counseling
Radames Velez	April 13, 2012 counseling
Robert Sears	May 3, 2012 written warning
Robert Sears	May 29, 2012 suspension

WE WILL rescind the public statements policy and general rule violations 6 from the employee handbook.

WE WILL furnish all current employees with inserts or amendments to the current employee handbook that (1) advise employees that the public statements policy and general rule violations 6 have been rescinded, or (2) provide the language of lawful rules; or publish and distribute revised employee handbooks that (1) do not contain the public statements policy and general rule violations 6, or (2) provide the language of lawful rules.

BURNDY, LLC

The Board's decision can be found at www.nlrb.gov/case/34–CA–065746 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Thomas Quigley, Esq., for the Acting General Counsel.
Michael Soltis, Esq. and *Joan C. Luu, Esq. (Jackson Lewis, LLP),* of Stamford, Connecticut, for the Respondent.

DECISION

STATEMENT OF THE CASE

LAUREN ESPOSITO, Administrative Law Judge. Based upon a charge in Case 34–CA–065746, filed on September 29, 2011, and amended on November 3, 2011, and December 16, 2011, by Glass Molders, Pottery, Plastics & Allied Workers Local 39B (the GMP), upon a charge in Case 34–CA–079296, filed on April 20, 2012, and amended on June 6, 2012, and July 30, 2012, by the GMP, and upon a charge in Case 34–CA–078077, filed on April 3, 2012, and amended on May 30, 2012, June 8, 2012, and July 30, 2012, by IUE-CWA, Local 485 (the IUE), an order consolidating cases, consolidated amended complaint, and notice of hearing issued on July 31, 2012. The consolidated amended complaint (the complaint) alleges that Burndy, LLC (Burndy or Respondent), violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by harassing union stewards, disparately enforcing a rule prohibiting loafing, imposing more onerous working conditions, and issuing written counselings, verbal, and written warnings, and a suspension to various employees in retaliation for their activities on behalf of the GMP and the IUE. The complaint further alleges that Burndy violated Section 8(a)(1) and (5) of the Act by prohibiting the IUE from using a photocopier for copying grievances, and refusing to pay the cost of printing its collective-bargaining agreement with the IUE. Finally, the complaint alleges that Respondent maintained unlawful work rules regarding disclosure of information, dress code, public communications, and soliciting, and alleges that a number of Respondent's managers made statements to employees or otherwise engaged in conduct violating Section 8(a)(1) of the Act. Respondent filed an answer denying the complaint's material allegations.

This case was tried before me on November 6, 7, and 8, 2012, and on January 22, 23, and 24, 2013, in Hartford, Connecticut. During the hearing, counsel for the Acting General Counsel (the General Counsel) amended the complaint to add allegations regarding statements to employees which violated Section 8(a)(1). The General Counsel also withdrew allegations that Respondent violated Section 8(a)(1) and (5) by failing to provide the GMP with requested information, or by an unreasonably delay in doing so, and by imposing financial charges on the GMP for providing the information requested.

FINDINGS OF FACT

I. JURISDICTION

Respondent operates a sand foundry in Bethel, Connecticut, where it manufactures cast electrical connectors comprised of various metals, utilizing the sand molding process, for use in the generation and transmission of electricity. Respondent admits and I find that at all material times it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent admits and I find that at all material times the GMP and the IUE have been labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Respondent's Operations

Respondent's Bethel facility is approximately 75,000 square feet, with roughly equal portions of that space appropriated to the foundry, various machining areas, and the warehouse and office. In order to manufacture its electrical connectors, Respondent's employees make patterns which are used to prepare molds. Molten metal is then poured into the molds to make the cast connectors. Respondent employs 75 to 80 employees at the Bethel facility. Approximately 28 of those employees work

in Respondent's foundry, including the pattern shop, the foundry finishing area, the core room, and areas containing machines such as the Wheelabrator, and are represented by the GMP. About 35 employees work in the warehouse, assembly, machining, tooling, and maintenance areas, and are represented by the IUE.

The standard work hours at Respondent's facility are 7 a.m. to 3:30 p.m. Overtime work on weekdays is scheduled prior to 7 a.m. The GMP-represented employees have a 32-minute unpaid lunch break, a 12-minute morning break, and a 10-minute afternoon break. The IUE-represented employees receive a 30-minute unpaid lunchbreak and two 10-minute breaks, one in the morning and one in the afternoon. The break and lunch times for the two bargaining units are staggered, such that the GMP morning break takes place from 8:48 to 9 a.m., and the IUE morning break takes place from 9 to 9:10 a.m. The IUE lunch break takes place from 12 to 12:30 p.m., while the GMP lunchbreak is from 12:30 to 1:02 p.m. The IUE afternoon break is from 2 to 2:10 p.m., and the GMP afternoon break is from 2:10 to 2:20 p.m. Break and lunch periods are signaled by bells or buzzers which sound when they begin and end.

Ed Marczyszak became the manager of the Bethel plant in March 2008, and has overall responsibility for all aspects of the plant's operations. Marczyszak reports to Vice President of Operations Jerry Heckman, whose office is located in Manchester, New Hampshire. Joseph Arnson has been Respondent's foundry supervisor for 8 years. He supervises the GMP-represented employees in the foundry department, and reports to Production Manager Keith Swanhall (Swanhall reports to Marczyszak). Brian Butler is the engineering supervisor, and is responsible for the three pattern shop employees in the GMP—Michael Cavaluzzi, Michael Vaast, and Dan Domeracki—as well as several engineers. Butler reports to Arnson. Mary Rovello is the human resources manager responsible for the Bethel facility, and reports to William Lochman, Burndy's director of human resources. Lochman's office is in New Hampshire, but Lochman is in close contact with Rovello, and serves as Respondent's chief spokesperson during negotiations with the Unions. Lochman reports to Andrea Frohning, the vice president of human resources for Hubbell, which purchased Respondent in 2009. Respondent admitted in its answer and I find that at all material times Marczyszak, Arnson, Butler, Rovello, and Lochman were supervisors within the meaning of Section 2(11) of the Act, and agents acting on Respondent's behalf. Marczyszak, Arnson, Butler, Rovello, and Lochman testified at the hearing.

The complaint's allegations pertain primarily to employees in Respondent's pattern shop, a lead person, and the material handler, who are represented by the GMP, and to a maintenance technician or mechanic, who is represented by the IUE. Respondent's pattern shop is located near its management offices at the front of the facility, near the cafeteria and a locker room which contains a bathroom. The employees in the pattern shop, supervised by Butler, make patterns for the sand molds into which molten metal will ultimately be poured to make the finished part ordered by the customer. The pattern makers also repair broken patterns. There are literally thousands of patterns stored throughout the facility. Each of the three pattern makers—Michael Vaast, Daniel Domeracki, and Michael Cavaluzzi—has their own workbench with a stool in the pattern shop, where they make and repair patterns for use in the production process. Unlike other areas of the facility, the noise level in the pattern shop is low and there is no need to wear ear protection.

Thomas Norton is the pattern coordinator. Norton has overall responsibility for the condition of the patterns, and if a pattern is broken he brings it to the pattern shop and explains to the pattern makers what needs to be done. Norton fills out a card, in effect a bill for the pattern makers' performing the necessary repairs, which accompanies the pattern. When the pattern has been repaired, Norton retrieves it from the pattern shop, and provides it to the machinists who will be making a mold based on the pattern. Norton also prepares a schedule regarding the metals which will need to be melted in order to begin preparing the finished part. Norton's work requires that he move throughout the entire facility. Norton is supervised by Arnson.

Robert Hing has been Respondent's material handler for the past 6 to 8 years, and is responsible for moving various materials around the facility, sometimes using a forklift. Based upon the schedule prepared by Norton, Hing moves metals and other materials to the areas necessary in order to complete a particular stage in the production process. In addition, Hing removes a bucket of scrap from the pattern area approximately once a month, and performs other tasks as requested, such as moving boxes. Hing's work requires that he move throughout the entire facility. Hing is also supervised by Arnson.

Robert Sears has been employed by Respondent as a maintenance technician or mechanic for 24 years. He works from 4 a.m. to 3:30 p.m. from Monday to Friday, and also works on Saturdays. Sears works out of a maintenance department, where the mechanics' tools and equipment are located, but performs work all over the facility, depending upon the specific machines that need repairs. Sears estimated that he spends only 2 hours out of each 11-hour day in the maintenance department, because most of his work is performed at machines elsewhere in the facility. He is supervised by Andy Foote. It was generally undisputed that Sears is a talented mechanic.

B. Collective-Bargaining Agreements and Union Leadership

Respondent has had collective-bargaining relationships with both the GMP and the IUE for a number of years, and its last negotiations with both Unions took place in 2011. Respondent's most recent collective-bargaining agreement with the GMP is effective by its terms from February 28, 2011, to February 27, 2015, and its most recent contract with the IUE is effective by its terms from January 23, 2011, to January 24, 2014. Both collective-bargaining agreements have grievance and arbitration provisions, and management-rights clauses. The IUE contract also has a complete agreement provision, or a "zipper clause." Finally, the IUE contract also has a provision at article 27(A) stating that "No member of the Union shall carry on union activities during working hours on the premises of the Employer."

Both Unions have officials employed by Respondent, and are also sometimes represented by business agents employed by the GMP and the IUE. Hector Sanchez was the GMP's International representative, employed by the Union, until March 2012, when Matt McCardy assumed that position. During the period material to the complaint's allegations, Thomas Norton, Respondent's pattern coordinator, was president of the GMP. Norton began his employment with Respondent in December 2010, and became president of the GMP in May 2011. Prior to Norton's becoming president, Jose Valentin had been president of the GMP for a number of years. Robert Hing has been the GMP's chief steward for 2 years and was a steward for 3 years prior to that. Hing files grievances and attends step 2 and 3 grievance meetings on behalf of the Union. Michael Vaast, a pattern maker, became recording secretary for the GMP in May 2011; while Vaast takes notes during meetings and prepares grievance forms, he is not a member of the GMP's negotiating team and does not participate in grievance meetings. Daniel Domeracki, a pattern maker, became the GMP's treasurer in May 2011, and also does not participate in negotiations or grievance meetings. Radames Velez, a lead person, had previously been chief steward for the GMP. Michael Cavaluzzi was a steward for the GMP until his resignation in September 2012. Norton, Hing, Vaast, Domeracki, and Velez testified for the General Counsel at the hearing.

Robert Sears has been a steward for the IUE for approximately 20 years. Herman Barnes is an IUE committee person, whom Respondent also recognizes as a steward. Until December 2011, Henry Agramonte was the IUE's chief steward. Humberto Leone is a business agent employed by the IUE. Sears testified for the General Counsel at the hearing.

C. Respondent's Work Rules and Practices Regarding Talking During Worktime

Norton, Vaast, Domeracki, Velez, and Sears all testified that employees discuss nonwork topics such as sports, politics, and the weather amongst themselves during worktime. The employees also testified that managers sometimes joined these conversations, and that it was common for both employees and managers to exchange pleasantries and chat for a few minutes after entering a particular area of the facility with the employees working there. For example, Norton testified that he discusses hunting and fishing with Arnson four to five times per week. Norton testified that he had also seen employees with adjoining workstations arguing during worktime. Velez testified that employees stop to talk to one another and to supervisors regarding sports and weekend activities during worktime, pausing in their work while doing so. Vaast also testified that it was not unusual for Butler, Arnson, and even Marczyszak to spend a few minutes discussing sports or the weather when they visited the pattern shop, and that he did not continue to work during these conversations.[1] Vaast testified that Cavaluzzi and Domeracki also spoke about nonwork topics on worktime in a similar manner. Arnson and Butler generally corroborated the pattern shop employees' testimony that they participated in brief discussions of nonwork-related topics on worktime. Butler testified that he enjoyed a good relationship with the pattern shop employees, whom he considered to be hard workers, as a result.[2]

Marczyszak testified that employees are generally permitted to talk to one another during worktime regarding nonwork-related matters, so long as they are working. As Marczyszak put it, employees "can talk all day as long as they can perform their task, and their mission adequately and they're not stopping." However, Marczyszak also testified that he typically exchanged brief pleasantries with employees on the shop floor, and indicated that brief conversations involving nonwork-related matters were generally acceptable, even if the employees did not physically work throughout (Tr. 797–798).

Since at least 2008, Respondent has maintained a list of general rule violations which include the following violation as rule 9: "Loafing or other abuse of time during assigned work hours." However, Norton, Vaast, Domeracki, and Velez all testified that they had never heard of any such rule prohibiting loafing. Marczyszak defined the difference between permissibly exchanging pleasantries and loafing as "taking more than just a few minutes" to talk without returning to work.[3] Rovello testified that "probably sometime in 2010" she began to cite general rule 9 in disciplinary notices, and refer to various types of conduct, such as smoking, as "loafing." Rovello testified that she began this practice because when Cavaluzzi was issued numerous disciplines for smoking, Hing, as GMP chief steward, took the position that smoking inside the facility should be treated as a different offense for progressive disciplinary purposes than smoking outside.[4] Under the progressive discipline applicable to employees in both bargaining units, the first offense results in counseling, the second in a verbal warning, the third in a written warning, the fourth in a 3-day suspension, and the fifth in discharge. Rovello contended that she began citing general rule 9 so that all incidents involving an employee's failure to work during worktime would be considered the same offense for progressive disciplinary purposes. Lochman testified that he directed Rovello to cite general rule 9 for all offenses involving not working during worktime "once things got a little bit more confrontational, where we saw the increase in grievances" on the part of the Unions.

D. Changes in Plant Management and GMP Leadership, Events of 2011

The evidence establishes that during the past 5 years, changes in Respondent's management personnel and in union leader-

[1] Velez testified that a conversation which lasted "a minute or two" was allowed during worktime, and Vaast testified that in his experience conversations of 5 minutes were acceptable.

[2] Sears also testified that in his experience the employees had always been permitted to speak to one another about nonwork-related matters for a few minutes at work, and had never been disciplined as a result.

[3] Respondent introduced into evidence what it described as discipline issued to bargaining unit employees for loafing or otherwise violating general rule 9 during the period January 1, 2008, to the present.

[4] Discipline for issues other than attendance expires a year after the last discipline for the particular offense was issued; discipline for attendance issues expires at the end of the calendar year in which the discipline was issued.

ship have resulted in a substantially altered collective-bargaining relationship. Marczyszak, who began as Respondent's plant manager in March 2008, proved to be more aggressive and rigorous in his approach to the employees than the previous plant manager. Marczyszak testified that when he began as plant manager he was unhappy with what he considered to be a lack of work ethic among the employees in the IUE bargaining unit, particularly Sears, the other maintenance employees, and an IUE machinist. Marczyszak testified that during his first year or so as plant manager, he discovered Sears engaged in nonwork activities during worktime on several occasions, such as smoking (both inside and outside the facility), fixing the tire on another employee's car, and having a pastry with the other maintenance employees. Marczyszak testified that he also removed a refrigerator and microwave from the maintenance area, as well as a printer being used for IUE business. During Marczyszak's first year as plant manager, the IUE filed unfair labor practice charges alleging that Steward Ray Dalton was discharged, and Sears was disciplined, in retaliation for their union activities. The Regional Director, Region 34, apparently issued a complaint against Respondent containing such allegations, which was settled by the parties. In addition, in November 2008, Dalton posted on the IUE bulletin board a notice proclaiming the 10th of that month "Red Shirt Day," and asking employees to wear a red shirt if they were dissatisfied with "the way that this Company is being run and the direction that it is headed." Marczyszak testified that a number of employees belonging to both Unions wore red shirts at the designated time. Lochman testified that in 2010 the bargaining unit employees had forwarded a petition complaining about Marczyszak to Andrea Frohning at Respondent's headquarters in New Hampshire. Finally, at some point after Marczyszak became plant manager he discovered that "Fuck you Ed" was written on each of the eight hoppers in the sand tunnel below the foundry.

By all accounts, when Norton was elected president of the GMP in June 2011, the relationship between the parties became even more contentious.[5] Marczyszak testified that Norton was a more aggressive union representative than his predecessor Valentin had been, and that the parties had been able to resolve issues more amicably prior to Norton's election. Marczyszak also testified that once Norton became president, GMP officers appeared to spend more time in grievance preparation, sometimes during worktime. Marczyszak testified that during a conversation with Arnson regarding this issue, he told Arnson, "[W]henever you see those union guys getting together and they're not working you write them up," and "tell them that I said so." Arnson confirmed that sometime between Norton's election and May 2012, he had been specifically directed by Marczyszak to look out for employees gathered together and engaged in conversation.

During the summer of 2011, cutoff operator Francisco Taveras was disciplined for poor performance, in particular for failing to make the applicable incentive rate for his position. As a result, on July 6, 2011, Norton submitted an information request asking that Respondent provide copies of all cutoff operator timesheets in order to investigate a grievance based on the discipline imposed.[6] Norton testified that on July 5, 2011, the day before he submitted the information request, in the office he shared with Foundry Supervisor Arnson, Arnson told him that if he was seen talking to Hing or any of the other stewards, he would be written up because it would be assumed that he was discussing union business on worktime. According to Norton, Arnson told him that as GMP president he had "a big target on [his] back," and that Marczyszak would "come gunning for [him]." Arnson corroborated Norton's testimony, stating that he informed Norton that if he was "stirring things up" or intended to "start things," "there's going to be a target on your back."

Subsequently on July 18, 2011, Taveras was suspended for failing to satisfy the incentive rates for the cutoff operator position, and on July 25, 2011, Norton filed a grievance alleging that the suspension violated the collective-bargaining agreement. Later that day, when Norton returned from lunch to his office, Arnson told him that he was late.[7] Arnson said that Marczyszak had directed him to tell Norton that Norton was late returning from lunch, but that Marczyszak was giving him a "bye" or a pass on the matter. Norton testified that about a half hour later, during his afternoon breaktime, he went to Marczyszak's office to give him a copy of an unfair labor practice charge. After he did so, he disputed Marczyszak's claim, conveyed to him by Arnson, that he had returned from lunch late, saying that he was back before the bell rang. Norton then compared Marczyszak's watch to his own phone, stating that Marczyszak's watch was the slower of the two.[8] Marczyszak then told Norton that if he was seen talking to Hing or any of the other union officers in the shop, it would be assumed that they were discussing union business, and they would be written up. Norton stated that when he was on company time he was there to work, and left. Marczyszak basically corroborated Norton's account of this conversation, but denied telling Norton that he would assume that any discussions between union officers involved union business, and a writeup would ensue.

[5] On February 25, 2011, prior to Norton's becoming president, Respondent and the GMP entered into an agreement for a successor collective-bargaining agreement, which contained more specific employee requirements for calling out sick and provided for penalties if an employee committed to overtime and then failed to work the scheduled hours. Marczyszak testified that these provisions were intended to ameliorate the problems involving absences and general "lack of work ethic."

[6] The parties continued to address this information request for months afterwards. It was ultimately the subject of allegations withdrawn by the General Counsel at the hearing. Although Norton testified that he did not believe that Valentin had ever submitted an information request to Respondent, he testified that GMP Business Agent Hector Sanchez had done so.

[7] Norton testified that he observed Marczyszak watching him while he ate lunch outside the facility. Marczyszak testified that he observed Norton remaining outside to smoke a cigarette after the buzzer signaling the end of lunch had rung.

[8] Marczyszak testified that because the facility's buzzers, and not individual watches or cell phones, determine the end of lunch and breaktimes any difference between the time displayed by his watch and Norton's cell phone was irrelevant.

Norton and Hing both testified that during September and October 2011, Arnson continued to tell them that if they were seen talking to other union officers or coworkers on worktime they would be written up based on the assumption that union business was being discussed. Norton testified that in September and October 2011, Arnson repeatedly told him that if he or Hing were discovered talking to any of the other pattern shop employees[9] they would be written up, "assuming that they were talking union business." Hing and Norton stated that on October 13, 2011, Arnson approached them as they were talking right before the lunchbreak, and told them, "If you guys are talking union business, I'm going to write you up."[10] Hing testified that Arnson said that he had been told to write the employees up if they were talking about union business.[11] Norton stated that although he could not recall the exact date, Arnson told him that if he saw Norton talking with Hing or any of the other stewards, they would be written up on the assumption that they were discussing union business. Hing also testified that after Norton became president, Arnson began interrupting his conversations with Norton, asking them what was going on and stating, "I hope you're not talking about Union business." According to Hing, when he responded that he and Norton were discussing work, Arnson said, "You know what Ed would do if he seen you talking," or discussing union business.

Arnson testified that sometime during the year after Norton was elected GMP president, Marczyszak had directed him to give the employees a "heads up" that if they were not working, management would "assume you're doing union business." Arnson testified that he thereafter informed Norton, Hing, and other employees, "Ed told me if I catch you that you'll be written up," when he saw them talking to one another on the shop floor. Arnson admitted that while he never wrote Norton up, he "always went up and said" that according to Marczyszak's instructions he was to assume that they were involved in union business if they were talking together on worktime, and to issue discipline. Arnson testified that although he typically saw Norton or Hing with a union contract or papers approximately three times each year, he never told them that they were not to conduct union business on worktime until the fall of 2011.

Arnson testified that after an initial 2-week period when he admonished Norton and Hing repeatedly in this manner, "we had a discussion in the office of—not to say that, not to use those words anymore." Instead, Arnson was apparently instructed to ask the employees "What are you doing?" or "Why are you bothering him while he's working?"[12] However, according to Norton, Arnson continued to approach him when he was talking to other employees, and ask him what they were talking about, what they were working on, and what Norton was doing in the area. In addition, Hing testified that beginning in the fall of 2011, Arnson began directing him to take another route to the bathroom, and stop going through the pattern shop. Arnson testified that he did so on several occasions, so that Hing would not be "tempted to stop" and talk to one of the pattern shop employees, even though Arnson admitted that he did not know whether, in the event that Hing did converse with one of the pattern shop employees, they were "talking shop."

Norton and Hing testified that Butler, the engineering supervisor directly responsible for the pattern shop, also admonished them and the other pattern shop employees against speaking to one another in a manner similar to Arnson. Norton testified that in September or October 2011, Butler told him "almost daily" that if he caught Norton or Hing talking to any of the pattern shop employees, he would assume that they were discussing union business, and write them up. Norton testified that he told Butler that he had to speak to the pattern makers every day in order to do his job. Hing also testified that some time after Norton became president he was talking to Cavaluzzi when Butler approached them. Butler asked Hing and Cavaluzzi what was going on, and said, "I hope you're not talking about union business." Hing testified that in the fall of 2011 and continuing into 2012, Butler interrupted his conversations with Norton and the pattern makers in the same manner as Arnson, asking them what was going on.

Butler testified that he was informed at a meeting with Marczyszak and Rovello that he needed to be on the lookout for employees abusing time. Butler testified that as a result, when he observed Hing and the pattern makers together, he told them that they were supposed to be engaged in work-related activities. Butler testified that he used the term "union activity" in the context of these conversations, but could not recall a specific example. Butler testified that in 2009 he had disciplined Cavaluzzi for doing union business on worktime. Finally, Butler stated that he had last asked Norton what he was doing in the pattern shop in early January 2013, even though he admitted that Norton "has typically always given me good reasons to be in the Pattern Shop."

E. Events of January 2012

In December 2011, a GMP-represented molder named Evan Cessa broke a pattern plate that he had been specially trained to work on, so that the pattern had to be remade. Domeracki reported the issue to Butler, who informed Marczyszak. Marczyszak then called Cessa into the pattern shop and, in Marczyszak's words, "chewed him out," telling him that he could be fired for damaging equipment, and emphasizing the cost to the Company for making the pattern. Marczyszak raised

[9] At the time, all of the pattern shop employees—Domeracki, Cavaluzzi, and Vaast—were GMP officers.

[10] Norton testified that he and Hing needed to discuss a number of work-related issues. Primarily, Hing needs to review Norton's paperwork to see how much metal to retrieve to fill the kettles once melted. Norton testified that because the next day's production schedule is susceptible to change, Hing consults with him several times a day regarding this information. Norton informs Hing how many furnaces he needs to light, and with what specific metals. Hing must also occasionally retrieve scrap metal and bring materials to the pattern shop. It is undisputed that Norton must visit the pattern shop and interact with the pattern makers regularly as part of his pattern coordinator duties.

[11] Norton testified that he and Hing were talking about going to lunch at Burger King at the time, whereas Hing testified that they were discussing work.

[12] It is not clear from his testimony whether Arnson was referring to the presentation entitled "'Work Time is for Work' Guidelines,"given by Rovello and Marczyszak in May 2012. Marczyszak did not testify regarding any other attempt to clarify with other managers the treatment of employee conversations and activities during worktime.

his voice at Cessa during this interaction, and Domeracki, who was present in the pattern shop at the time, testified that he had never seen Marczyszak angrier.

On January 3, 2012, Norton, on behalf of the GMP, and Henry Agramonte, then the IUE's chief steward, sent a letter to Rodd Ruland, Andrea Frohning, Lochman, Rovello, and Swanhall protesting what they termed a "hostile work environment." The letter stated that the employees at the Bethel facility believed that they were "being harassed, intimidated and threatened" by Marczyszak "on a daily basis, for no good reason," and asked upper management to intervene. The letter further asked that Cessa and all other employees receive an apology for Marczyszak's "harassment and intimidation" during the previous month, and suggested that Marczyszak "be sent for anger management and a psychiatrist for the way he treats his employees and supervisors." Finally, the letter stated that the Unions were "documenting all retaliatory actions" on Marczyszak's part. The letter contained an attachment signed by approximately 49 employees.[13]

Finally, on January 31, 2012, the Regional Director, Region 34, issued a complaint and notice of hearing against Respondent in Case 34–CA–065746. This initial complaint alleged that Respondent had unlawfully refused to provide information to the GMP or unreasonably delayed in responding to its information requests, unilaterally imposed financial charges for satisfying information requests, threatened employees with discipline and unspecified reprisals, conducted surveillance and created the impression of surveillance, prohibited employees from discussing the Union and their working conditions, and harassed union stewards. This complaint was served on Respondent the same day.

F. Discipline Issued to Sears and the GMP Officers in February 2012[14]

1. The February 3 incident involving Sears and ensuing discipline

Sears testified that on the morning of February 3, he began work at 4 a.m., disassembling a press and bringing the parts to the machine shop and the storage area. After completing these tasks, at about 8 a.m., Sears needed to use the bathroom. On the way to the main bathroom, located in the locker room, he saw Cavaluzzi in the pattern shop working at his bench, and stopped to say hello. Cavaluzzi asked whether he would be paid for his time at an upcoming GMP arbitration hearing, and Sears said that Ray Dalton had been denied pay for his time attending an IUE arbitration. Sears testified that he was leaning on a tall chair in the pattern shop during this exchange,[15] which lasted for about a minute or two. While Sears was talking to Cavaluzzi, Marczyszak approached them, and asked what Sears was working on in the pattern shop. Sears testified that he told Marczyszak that he was working on going to the bathroom, and walked away in that direction.

Marczyszak testified that at around 8:30 a.m. on the morning of February 3, he and Swanhall were on their way to a scrap review meeting in the quality control conference room. As they entered the pattern shop area, Marczyszak stopped to put on safety equipment, and saw Sears on the stool next to Cavaluzzi's workbench, talking to Cavaluzzi. Marczyszak testified that as he walked along the corridor toward the quality control conference room he observed Sears and Cavaluzzi talking. Therefore, instead of going to the conference room he proceeded until he reached the end of the aisle along the pattern shop, 3 to 4 minutes later. At that point, Sears and Cavaluzzi were still talking, so Marczyszak approached them and asked Sears what he was working on in the pattern shop. Sears responded that he was working, and when Marczyszak asked him on what, Sears responded that he was working on going to the bathroom. Cavaluzzi had a pattern on his bench and a tool in his hand at the time.

Marczyszak then consulted with Rovello to determine what level of discipline was appropriate for Sears given the progressive disciplinary system, and directed Foote to prepare the actual writeup based upon his (Marczyszak's) observations. Sears testified that later on February 3, he was called into Foote's office, and given a counseling by Foote for violating general rule 9, which prohibits "Loafing or other abuse of time during assigned working hours." Foote told Sears at the time that he did not agree with the counseling, but had been directed to issue it. Sears said that he had never heard of such a thing. He told Foote that the employees talk to one another all the time, and that he had not done anything wrong, only said good morning to Cavaluzzi.[16] Cavaluzzi was not disciplined regarding this incident.

The IUE filed a grievance regarding the February 3 counseling issued to Sears, and a step 2 grievance meeting was held on March 1 with Rovello, Swanhall, Sears, and Barnes. Sears testified that Rovello read the February 3 counseling, and said that Swanhall had seen Sears sitting down after Sears had visited the bathroom, which confirmed Marczyszak's conclusion that Sears was "loafing." Sears testified that he told Rovello that as a mechanic, he not only performs physical repair work, but also needs to think about how to repair broken machinery. According to Sears, he tried to analogize to Rovello's work by stating that Rovello was not working only when physically typing words, but also when mentally composing text. According to Sears, Rovello became upset, and stated that Sears had initially claimed to Marczyszak that he was working in the pattern shop, as opposed to going to the bathroom. Sears then became frustrated, and after explaining that he had never

[13] In addition, on January 4, 2012, the GMP filed a grievance regarding the manner in which Marczyszak confronted Cessa regarding the broken pattern plate. Marczyszak testified that during a step 3 meeting on February 29, 2012, the parties agreed to meet with everyone involved and discuss the incident in order to explain their positions and, as Marczyszak testified, "make amends." Although the conciliatory meeting never took place, Cessa was not disciplined regarding this incident. In addition, Respondent agreed that in the future a GMP representative would be present when a bargaining unit member was reprimanded by management.

[14] All subsequent dates are in 2012, unless otherwise indicated.

[15] Sears testified that he experiences pain in his left leg while walking and standing due to a problem with his spine which requires surgery.

[16] Foote did not testify at the hearing.

claimed to be working, said, "How many fucking times do I have to tell you that's not what happened." Sears testified that he had previously used vulgar language during grievance meetings.

Rovello testified that the step 2 meeting began with Sears denying that he had been sitting down while talking to Cavaluzzi, and stating that he hadn't spoken to Marczyszak. Rovello testified that Sears then asked her, "What do you do all day?" According to Rovello, she responded that she was not at the step 2 meeting to discuss her own work, and Sears said that she sat at her desk. Rovello reiterated that her own activities were not at issue, and Sears said that Rovello was at her typewriter all day long, and "I want to know what you fuckin' do all day." Rovello testified that at that point she told Sears that his behavior was inappropriate, and ended the meeting. According to Rovello, Sears had never sworn at her in that manner before.

On March 7, Rovello sent Sears and Barnes a response denying the IUE's grievance regarding Sears' February 3 counseling. In her response, Rovello stated as follows:

> Humberto Leon, your IUE Local 485 President, ended our negotiations in February 2011 with a speech on mutual respect. During the step #2 grievance Robert Sears steward became abusive and stated to me "Right now I'm asking you what you are f—ing doing." The Company does not tolerance [sic] or accept abusive behavior during our grievance meetings. We respect the Union and expect respect in return. Further inappropriate behavior will result in discipline according to the Company's rules.

(GC Exh. 40.)

Subsequently there was a step 3 meeting regarding the February 3 counseling, attended by Marczyszak, Rovello, Swanhall, Leone, Sears, and Barnes. Rovello testified that Leone argued that Sears had been a good worker for 24 years, and had just needed to sit down and rest at the time he was talking to Cavaluzzi. Marczyszak and Sears discussed the incident again, and Leone said that everyone needed to go to the bathroom. Marczyszak countered that there was a bathroom right next to Sears' workstation, and sitting in the pattern shop was different from going to the bathroom. Ultimately Respondent denied the grievance, which was never moved to arbitration by the IUE.

2. The February 8 incident involving the GMP officers and ensuing discipline

On February 10 and 13, Rovello issued written counselings to Norton, Domeracki, Cavaluzzi, and Vaast for "Loafing or other abuse of time during assigned working hours." These counselings were based on an incident which took place in the pattern shop on February 8.

Rovello testified that on February 7, Hector Sanchez, the GMP's International representative, called and told her that he would be coming to visit the facility the next day with Area Vice President Don Seal. Sanchez told Rovello that he wanted to meet with the GMP officers and introduce Seal to the GMP members at the shop. They arranged for Sanchez and Seal to visit the shop during the employees' lunch period, from 12:30 to 1 p.m. Norton, however, testified that the GMP officers expected Sanchez and Seal to arrive at 3:30 p.m.

Rovello testified that Sanchez and Seal arrived at about 12:05 p.m., and chatted with her in the foyer of the building. After about 15 minutes, Sanchez and Seal asked Rovello to let the GMP officers know that they were in the plant, so that they could begin the meeting immediately when the GMP lunchbreak started at 12:30 p.m. Rovello testified that she went to the pattern coordinator area, but Norton was not there, and she was unable to locate Hing. She therefore went to the pattern shop to find Cavaluzzi. Rovello testified that when she entered the pattern shop, she saw Norton, Cavaluzzi, Domeracki, and Vaast standing around Cavaluzzi's work area talking. According to Rovello, as she approached Cavaluzzi's bench she saw that Cavaluzzi had a drawer open and the GMP union contract booklet, a small book with a blue cover, in front of him. Rovello testified that she asked the group what they were doing, and Cavaluzzi put the book in the drawer and closed it, saying, "I'm sorry." Norton had a folder that he closed, and Vaast and Domeracki left Cavaluzzi's bench. Rovello told the group that Sanchez and Seal were in the facility, and Norton then opened his folder and attempted to hand Rovello something. Rovello told Norton, "Not right now." Rovello testified that she did not know how long the group had been together before she approached them, but there was no pattern in the area at the time.[17] Rovello testified that she returned to the foyer and told Sanchez and Seal that the GMP officers were not working.

Norton, Vaast, and Domeracki testified that right before the 12:30 p.m. lunchbreak on February 8, Norton had brought a broken pattern to the pattern shop to be repaired. Norton and Vaast testified that they were standing around Cavaluzzi's bench with Cavaluzzi, discussing how to repair the pattern, which was on Cavaluzzi's bench, and who was going to work on it.[18] Domeracki testified that he was at his own bench working on another job at the time, but stated that there was a job on Cavaluzzi's bench. Norton testified that they had been discussing the pattern for about 4 minutes, when Rovello approached him from behind. Norton, Vaast, and Domeracki testified that Rovello asked them what they were doing. Norton said that they were just breaking up and began walking away, when Rovello said that Sanchez and Seal were waiting in the lobby. Norton told Rovello that he had grievances that had not yet been signed, and that he wanted to see her later in the day. The bell then rang for lunch, and the GMP officers went to meet with Sanchez and Seal. Norton testified that at the time he was carrying paperwork for the pattern repair in a manila folder.[19]

On February 10, Rovello issued a counseling to Norton for "Loafing or abuse of time during assigned working hours." The counseling was issued in Arnson's office, with Rovello,

[17] Rovello testified that she was not familiar with every pattern in the shop.

[18] Norton and Vaast testified that Norton typically brings a broken pattern to the pattern makers to discuss it with them before preparing the card which records the work necessary for the repair.

[19] Arnson confirmed that when Norton brings a broken pattern to the pattern shop, he also carries paperwork identifying the broken pattern or plate and the work to be done. Norton testified that he also keeps union documents such as grievances and other nonwork-related items such as birthday and other greeting cards in this manila folder.

Arnson, Hing, and Norton present. Rovello began by describing the discipline to Norton, and handing him a copy of the counseling. Norton and Hing testified that Rovello told him that he was engaged in union business at the time that she approached him, and Norton said that she was wrong. According to Norton and Hing, Norton told Rovello that she was issuing the discipline to him in retaliation for the unfair labor practice charges that he had filed against Respondent, and Rovello denied doing so. Norton stated that he was not loafing, but had brought a pattern to the pattern shop. Norton then told Rovello, that she had fabricated the entire incident, referred to it as "bullshit," and crumpled up the counseling and threw it on the floor.[20] Norton then left Arnson's office in order to calm himself, and Rovello sent Hing after him. When they returned, Norton and Hing testified that Norton apologized to Rovello, telling her that she "got his blood pressure up." Norton testified that as Rovello left the meeting she was smiling, and he told her, "[Y]ou got what you wanted." Norton denied telling Rovello that he was going to get even with her.

Rovello also testified that as she was reading the counseling, Norton took it out of her hand, said, "This is bullshit," and crumpled it before leaving the room. According to Rovello, when Norton returned he told her that the discipline wasn't right, and Hing said that Rovello needed to "give [Norton] a break." Norton told Rovello, "[T]his is not the way I work. This is not the type of person I am." Rovello confirmed that Norton told her, "You got my blood pressure up." According to Rovello, Norton then said, "I'm not going to stand for this. I'll get even." He then left the room again, and Hing signed the counseling at Rovello's instruction. According to Rovello, during this meeting Norton and Hing did not contend that the employees had been working on a pattern at the time that she approached them. Arnson prepared a statement describing this meeting which also states that Norton told Rovello, "[Y]ou keep smiling Mary we'll get even."[21]

Vaast, Domeracki, and Cavaluzzi were issued similar counselings by Rovello on February 13. Rovello, Butler, and Hing were also present at this meeting. Vaast and Domeracki testified that Rovello told the employees that she thought they were having a union meeting, and Cavaluzzi said that they were not, that they were talking about a job. Domeracki also testified that Hing told Rovello that the employees should not be written up, but Rovello insisted that they were doing union business. Rovello testified that Cavaluzzi said, "This isn't fair," but did not claim at this meeting that the employees were discussing a job.

Pursuant to the collective-bargaining agreement's grievance and arbitration provisions, the GMP filed a written grievance regarding the counselings issued to Norton, Vaast, Domeracki, and Cavaluzzi within 5 days of February 10. In its grievance, the GMP contended that Norton and the pattern makers were discussing the repair of a pattern plate when Rovello approached them, and not conducting union business. Within the next 2 weeks a step 2 meeting was held with Rovello, Butler, Cavaluzzi, and Hing. Hing testified that Vaast and Domeracki were also present during this meeting. Hing stated that Rovello told the employees that she saw them talking when she approached them in the pattern shop on February 8, and assumed that they were doing union business. Hing testified that he protested that the employees were all in their work areas, and Rovello countered that one had the union book open on his desk. Domeracki said that he was working, not talking, at the time, and Rovello said that he was probably the only one who was working. According to Hing, Cavaluzzi said that he was standing at his work desk with the drawer open. Rovello testified that at this meeting Cavaluzzi called her "delusional," and told her, "There's one of you, there's four of us." Butler also testified that Cavaluzzi made these statements whereas, Hing testified that he did not. According to Butler, at this meeting Rovello also stated that she did not believe the employees' claim that they were working on a pattern at the time. Rovello refused to rescind the counselings, and the meeting ended. Rovello testified that she later called Lochman, because she was upset at having been called delusional.

On March 30, Norton wrote to Respondent to move the grievance to step 3 of the grievance procedure. Subsequently, a step 3 meeting was held with Hector Sanchez, Norton, Hing, and Cavaluzzi attending for the GMP, and Marczyszak, Swanhall, and Rovello attending for Respondent. Rovello testified that at this meeting Hing stated that on February 8, the disciplined employees were "getting ready for the meeting," but Sanchez and others told him that because he was not present at the time he should not discuss it. Hing testified that the meeting focused on Norton and his conduct when presented with the counseling, although Norton also contended that he was discussing or working on a pattern on February 8. Rovello and Hing testified that Respondent proposed removing the four counselings in exchange for the GMP's withdrawing the charges underlying Region 34's complaint, but the Union refused to do so. Rovello contended in her testimony that after the step 3 meeting, Sanchez told her that the GMP officials "stretch the truth a lot," and may have been referring to a pattern they were working on earlier on the morning of February 8. Norton testified that prior to this meeting the GMP had requested information regarding previous discipline for loafing, and Rovello responded that the Company had only begun to refer to incidents involving employees' failure to work during worktime as "loafing" at that point. At the time of the hearing, the GMP grievance regarding the discipline issued to Norton, Vaast, Domeracki, and Cavaluzzi based upon the February 8 incident was still unresolved.

[20] Norton testified that he also told Rovello that he had never been written up for the February 2 incident mentioned in Rovello's February 10 counseling. Rovello testified that she did not discipline Norton or Hing for this incident.

[21] The following week, there was a disciplinary meeting regarding Norton's use of vulgarity during the February 10 meeting with Rovello and Arnson. This meeting was attended by Marczyszak, Swanhall, Butler, Norton, and Hing. Marczyszak told Norton that he had threatened Rovello during the February 10 meeting by telling her that he intended to get even with her, and Norton responded that he had only said to Rovello, "[Y]ou got what you wanted." With respect to the vulgarity, Norton admitted using the term "bullshit." This was apparently the end of the matter, and Norton was not disciplined regarding any remarks he may have made to Rovello.

G. The March 2 Meeting with Lochman

In March, Lochman visited the Burndy facility on two occasions for labor-management meetings, in order to discuss the overall relationships between Respondent and the Unions. The meeting with the GMP took place on March 2 in the facility's conference room, from approximately 10 a.m. to 2 p.m. Lochman, Marczyszak, Swanhall, and Rovello were present for Respondent, and GMP Vice President Donald Seal, Sanchez, Norton, Hing, and Cavaluzzi were present for the GMP. Norton, Hing, Lochman, Marczyszak, and Rovello testified at the hearing regarding this meeting.

Hing testified that Seal and Lochman stated that the meeting had been arranged because of the large number of pending grievances, and the generally contentious state of the relationship between Respondent and the GMP. Norton testified that Lochman said that Norton himself appeared to be the biggest problem at Burndy, and that the GMP leadership—Norton, Vaast, and Hing—were "troublemakers." According to Norton and Hing, Lochman said that the new GMP officers had created a big problem by filing a large number of grievances, which had not occurred before Norton became president. Norton responded that he did not create the problems in the plant, and that the major difficulty was Marczyszak, who was interfering with the employees' work. Norton continued that the GMP's problems with Marczyszak had begun before he was elected GMP president, and that Valentin had in fact resigned as president after Marczyszak had threatened him. Hing testified that he told Lochman that Norton had a better idea of what was going on in the plant than Valentin, and was more vigilant in terms of investigating and enforcing the contract. The parties also discussed the January incident where Marczyszak berated Cessa for breaking the pattern plate. Seal stated that both sides had become polarized, and needed to find a way to move forward out of their deadlock. Seal said that the Union realized that its members had good jobs, compensation, and benefits, and that if there was tension on the shop floor the parties needed to figure out what was causing it, and consider to the perspectives of everyone involved.

Norton testified that Lochman echoed some of these sentiments, stating that Respondent and the GMP enjoyed a good relationship, with very few grievances and no arbitrations. Lochman stated that the GMP bargaining unit wages were 20 to 70 percent above market, with excellent benefits, and employee turnover was consequently very low. Lochman also stated that Marczyszak had not been disrespectful to the GMP, and ran an excellent plant. As a result, Lochman said that Marczyszak's position would not be in jeopardy regardless of the Union's efforts. The GMP agreed to attempt to work with Respondent to try to resolve the outstanding grievances, which would hopefully improve the relationship. Norton and Hing testified that during the meeting, Lochman stated that if the GMP kept raising grievances, management was going to come down hard on the Union. According to Norton, at the end of the meeting everyone shook hands, and Seal later told him that it had gone well, and everyone should start to work on moving in a more positive direction. However, Seal also told Norton that the Union was "not going to get anywhere" with Marczyszak.

Lochman testified that he arranged for the March 2 meeting while talking to Seal about Respondent's relationship with the GMP at an arbitration which took place earlier in the year. Lochman testified that the meeting began with Seal expressing his concern over the change in the relationship between the GMP and the Company during the past year. Seal stated that Respondent provided very highly paid jobs[22] which he did not want to lose, and that he was concerned that at some point Hubbell, Respondent's new owner, would decide that the Bethel facility was not viable and close it. Norton then spoke, saying that there was quite a bit of stress on the shop floor, and that he wanted to see it reduced. Lochman testified that he then stated that Respondent had had a very good relationship with the GMP, with very few arbitrations and only six grievances per year.[23] However, "all of a sudden" 19 grievances had been filed in 6 months, as well as multiple unfair labor practice charges, so that the Company was now "getting it in the groin." As a result, Lochman stated that "under the new regime I saw that it was really disintegrating," with relationships that had been developed through negotiations deteriorating. Lochman stated that because Norton had only been with the Company for 18 months and had never attended negotiations, he was unaware of the background of compromise that Respondent and the GMP had achieved over the years. Lochman asked whether management had ever used profanity with the union representatives, as they had with Marczyszak, and Hing said that they had not. Lochman concluded that overall there had been a "major change" as a result of the new GMP leadership. Lochman also said that Hubbell did not have similar problems at their other unionized facilities, including their GMP-represented facility in Leeds, Alabama, and reiterated that there had been a major increase in grievances since Norton became president. Lochman stated that he wanted to develop a partnership between management and the union leadership, which had been the case when Valentin was president, as opposed to a confrontational relationship. Lochman provided examples of Respondent's attempts to do so, such as agreeing to a 4-year collective-bargaining agreement and permitting the GMP to negotiate its contract after the IUE. Lochman also confirmed that the parties discussed the petition engendered by the Cessa incident, and stated that the Unions wanted the Company to get rid of Marczyszak, which he said was "not going to happen." Lochman denied stating at the meeting that the Company intended to come down on the GMP officers. Marczyszak and Rovello also testified that Lochman never made such a statement. Lochman testified that Seal later said that he felt that the meeting had gone very well, and the parties had cleared the air. Marcyszak and Rovello testified that they had a similar impression.[24]

[22] Lochman also testified that he made this point during the meeting, in the manner described by Norton.

[23] Lochman made his remarks based on a prepared outline of topics that he intended to cover, which also contains some notes of the ensuing discussion.

[24] Lochman had a similar meeting with the IUE on March 27, attended by the same company representatives and by Leone, Agramonte, Barnes, and Sears for the Union. At this meeting, Sears gave Marczyszak a copy of an unfair labor practice charge alleging that his

H. The April 12 Discipline Issued to Sears and Hing

On April 12, Sears received a verbal warning and Hing received counseling, based upon an interaction between them earlier that day as Hing was driving a forklift in the area of the old machine shop. Sears, Hing, and Butler testified regarding this incident.

Sears testified that at approximately 7 a.m. on the morning of April 12, he was retrieving his forklift from the old machine shop area when he passed Hing, who was driving a forklift and picking up a barrel of scrap in the old machine shop. Hing had a copy of the GMP contract booklet on top of his clipboard on the forklift. Sears testified that he said good morning to Hing, and asked Hing if the GMP contract was on the page for bereavement pay. Sears was interested in looking at the contract's bereavement pay provision, because the day before Hing had asked him about the availability of bereavement pay for the death of a step relative, which the IUE contract did not provide for. Sears asked Hing to borrow the GMP contract to take a look, and pulled it off Hing's clipboard. When he looked at the contract, it was not open to the page for bereavement pay, so Sears said, "[T]hat's not the article," and stuck it in his back pocket as he walked toward his forklift. Hing told Sears that he had to go, because people were waiting for him. Sears testified that the air-compressor in the old machine shop was running at the time, which creates a noise level of 85 decibels, so that any extended conversation would have been impossible. According to Sears, his entire encounter with Hing lasted for about a minute.

Hing testified that on April 12, Sears approached him as he was using a forklift to bring material out of the pattern area. Hing testified that Sears took his GMP contract booklet from off of a clipboard he had on the forklift. At that point, Hing stopped the forklift, and Sears proceeded to open the book. According to Hing, Sears was talking but he did not pay attention. Hing said that he saw Butler walk by at the time. Sears then put the book back on the clipboard, and Hing restarted the forklift and left the area. Hing testified that the entire interaction lasted "a moment."

Butler testified that on the morning of April 12 he was on his way to the pattern shop to collect information on completed jobs when he saw Hing sitting in his forklift, and Sears leaning against it with an open book in his hand, reading aloud. Butler could not recall whether machinery was running in the area at the time, but testified that he heard Sears say, "excused absences;" Hing was silent. Butler testified that he observed Sears and Hing for "more than a minute," and concluded that Hing and Sears were not working. He therefore went to look for their supervisors, instead of proceeding to the pattern shop. Butler was unable to locate Arnson and Foote, so he reported the incident to Marczyszak, who directed him to discipline Sears and Hing. Butler consulted with Rovello, who informed him that for "abuse of time" Sears was at the verbal warning stage of progressive discipline. Foote also consulted with Rovello regarding the counseling issued to Hing for this incident.

Sears testified that around lunchtime, he and Foote were called to the machine shop supervisor's office. Marczyszak was in the office, and Barnes was called in. Marczyszak said that he was giving Sears a verbal warning for loafing because he was talking to Hing, and gave Foote a writeup to read. Foote read it and told Sears that it was a surprise to him, because he knew nothing of the underlying incident. Marczyszak told Sears that he had been abusing time, and Sears stated that the writeup constituted harassment, because he had done nothing wrong. Hing testified that Rovello later called him into the conference room, with Norton also present. Rovello read the discipline, a counseling, and gave a copy to Hing. Hing told Rovello that he was not talking to Sears, but had been working at the time.

A step 2 meeting regarding the discipline issued to Sears was held with Sears and Barnes, and Rovello, Butler, and Foote. Sears testified that Rovello said that he was being disciplined for abuse of time, as Butler observed him discussing a contract with Hing. Sears protested that Butler was wrong. According to Sears, Butler said that he had seen Sears reading a specific paragraph of the GMP contract regarding excused absences. Sears said that Butler was mistaken. Rovello testified that Sears stated that he was going "from Point A to Point B" in the shop when he saw Hing, said hello, and pulled a book off of Hing's forklift. According to Rovello, she asked Sears what book he was referring to, and Sears refused to tell her. Rovello also testified that Sears denied speaking to Hing at this meeting.

Hing testified that at the step 2 meeting regarding his counseling, he told Norton, Swanhall, and Rovello that he was working when Sears walked by and picked up his GMP contract book. At that point, Butler passed by as well. Swanhall brought Butler into the meeting, and according to Hing, Butler admitted that he had only seen Hing for "10 seconds," and that Hing didn't speak. Rovello asked Hing what he and Sears were talking about, and Hing contended that it was none of her business. Rovello continued to pose the question to Hing, and and Norton interrupted her, saying, "We ain't in Russia." At that point, Rovello ended the meeting.

A step 3 meeting regarding the verbal warning issued to Sears was held on May 25, attended by Sears, Barnes, and Leone, and by Marczyszak. Leone argued that the Company should rescind the warning, because it seemed petty to him, an attempt to push the Union "to the edge." Marczyszak testified that Sears said that he had asked Hing how he was doing and took the book from Hing's forklift, because he wanted to look up something that Hing had asked him about earlier. Marczyszak testified that Sears contended that the incident was very brief, only a few seconds, and also claimed that he and Hing were discussing the company handbook, and not a union contract. Sears said that things had begun to deteriorate in January 2012, and Marczyszak responded that Sears had been issued numerous disciplines stretching back to 2008.[25] Rovello testified regarding this meeting as well, but stated that Sears did not speak at all. Sears testified that at this meeting he never

February 3 counseling, and Rovello's March 7 threat to discipline him, violated Sec. 8(a)(1) and (3) of the Act.

[25] Sears testified that he was referring to discipline for loafing when he made this remark.

denied asking Hing whether he could see the GMP contract on Hing's forklift.

A step 3 meeting regarding Hing's counseling was also conducted. Marczyszak testified that at this meeting, Hing contended that he was effectively forced by Sears to stop while he was driving the forklift.

The grievances regarding the discipline issued to Sears and Hing based on the April 12 incident are still pending.

I. The Counseling Issued to Radames Velez

Radames Velez has been employed by Respondent for 18 years, and is now a lead person. Velez works from 4 a.m. to 12 p.m. Monday and Tuesday, and from 4 a.m. to 3:30 p.m. Wednesday, Thursday, and Friday. Velez has no specific assigned work area. He begins his shift by preparing machines for production, and then informs the cutoff operators and grinders as to what needs to be done as the shift progresses. Velez is a member of the GMP bargaining unit, but has not been an officer since he was lead steward from 1996 to 1999. Arnson is his supervisor.

Velez testified that on April 12 he was going through the pattern shop to go to the bathroom when he stopped to talk to Cavaluzzi about the previous day's baseball game. Velez testified that after speaking to Cavaluzzi for a couple of minutes, he saw Rovello approaching them, and walked toward her. According to Velez, Rovello asked whether they were talking about work, and Velez stated that they were discussing sports. Rovello testified that she asked Velez what he was working on, and Velez stated that he was not working, he was just having a conversation. Rovello told Velez that he was not supposed to be in the pattern shop,[26] and Velez testified that he apologized to be polite. Rovello told Velez that she was going to give him a counseling, and walked away.

The next day, Marczyszak and Rovello issued a counseling to Velez in Arnson's office. Velez testified that Hing was present also. Velez testified that he did not sign the counseling because he didn't believe that he was doing anything wrong by talking to Cavaluzzi.[27]

J. The May 3 Written Warning Issued to Sears and Respondent's Refusal to Permit IUE Representatives to use the Office Photocopier for Copying Grievances

Sears testified that on May 3, at approximately 8:40 a.m., he was on his way to the drinking fountain next to the pattern storage area,[28] when he saw Norton passing by with a pattern to put away. They said good morning, and Norton asked Sears if he wanted to attend an upcoming meeting with an NLRB agent. Sears asked when the meeting would occur, and said he might not be able to make it if he was scheduled to work. According to Sears and Norton, this entire interaction took a minute or two. Marczyszak then approached Sears from behind, and asked him what he was working on, and whether he had work to do in the maintenance department.[29] Sears said that he could probably find some, and left.

Butler testified that he was going to a meeting in the quality control conference room when he saw Sears standing in the pattern prep area. Butler believed that Sears had no work-related reason to be in that area, so when he arrived at the quality control conference room for his meeting, he told Marczyszak that Sears was "hanging around the pattern storage area . . . not working." Marczyszak testified that he stepped into the hallway and saw through a window in the doorway that Sears was standing next to Norton's bench, talking. Marczyszak testified that he observed Sears for "three or four minutes" before approaching him and asking him what he was working on and whether he had any work to do.[30] Sears said no, so Marczyszak asked him whether he had work in the maintenance room. Sears said that he had just come to get a drink of water, and left.

Marczyszak testified that a few hours later in the office, he saw Sears copying something on the office copier. Marczyszak testified that he asked Rovello whether Sears was supposed to be there, and she answered no. Marczyszak then approached Sears and asked what he was doing, and Sears replied that he was making a copy. Marczyszak told Sears he was not supposed to be copying documents on worktime, and Sears said that he always did so. Sears testified that since the beginning of his employment he and the other IUE officers had used the office copier to copy grievances and other union-related documents, on many occasions in front of Rovello's predecessor, Joan Marie Bresnahan. According to Sears, he also used the office copier in December 2011 to copy medical records for submission to human resources. Sears testified that he was never before required to wait until lunch or breaktime to use the copier.

Some time on May 3, Sears was issued a written warning for "loafing or other abuse of time" by speaking with Norton in the pattern area that day.[31] The May 3 written warning also stated that Marczyszak had observed Sears at the office copier on May 2, engaged in nonwork-related activity during worktime.

A step 2 meeting regarding the discipline was conducted on May 18, with Barnes, Sears, Swanhall, and Rovello. Rovello testified that Sears contended that he was only getting a drink of water, and stated that the Company was trying to fire him. According to Rovello, Sears said that he did not tell Marczyszak that he was getting a drink of water when Marczyszak confronted him in the pattern area. Sears testified that Rovello stated that Barnes had already been written up for using the officer copier, so that Sears should have known that he was not permitted to use it. Sears said that he did not recall that, and Rovello said that he must have amnesia. Sears re-

[26] Rovello and Butler stated that Velez had no work-related reason to be in the pattern shop.

[27] Rovello testified that Cavaluzzi was not disciplined as a result of this incident, because he appeared to be working at the time.

[28] Norton testified that the water cooler is approximately 2 feet from his workbench.

[29] Norton testified that Marczyszak approached him and Sears immediately after Sears greeted him. Norton testified that he could not recall the specific statements made by Sears and Marczyszak.

[30] Butler testified that Marczyszak observed Sears through the window for "a moment or two, or a minute or two" before leaving to approach Sears.

[31] Marczyszak testified that Norton was not disciplined because he appeared to be working, as there was a pattern on his desk at the time.

sponded that he would give Rovello a nickel for the piece of paper he used, and she said that was insulting.

A step 3 meeting was also conducted with Marczyszak, Swanhall, Rovello, Leone, Sears, and Barnes. Rovello testified that during this meeting Leone stated that Sears had been employed for 24 years, was an excellent mechanic, and should not be penalized for needing a drink of water. Marczyszak stated that Sears could have gotten a drink of water outside the maintenance office or inside the quality room. According to Rovello, Sears did not speak during this meeting. The IUE never filed a grievance regarding Respondent's refusal to allow Sears to use the copier for nonwork-related purposes.[32]

K. The May 29 Suspension Issued to Sears

Sears testified that on May 29, he arrived at work at 4 a.m. After he repaired a press in the machine shop and the Wheelabrator, Arnson asked him to look at the Morgan furnace. After working on the furnace, Sears chained open the foundry and maintenance doors and turned on a fan. He then went to his locker area in the maintenance department, took off his Burndy uniform shirt, and hung it up.[33] Sears' locker area is separated from the rest of the maintenance department by a curtain. He opened a can of Pepsi and sat down on a stool in the locker area[34] to rest for a minute before proceeding to his next assignment, working on the no. 3 aluminum furnace. He had been sitting for less than a minute when he heard the voices of Marczyszak and Arnson. Marczyszak opened the curtain, and Sears stood up. Marczyszak asked what time Sears had arrived at work, what he had done, and what he was working on. Sears explained what he had done that morning, and described his next task. Marczyszak and Arnson then walked away, Marczyszak saying to Arnson, "You're my witness—you saw him sitting there." Sears testified that no one had ever entered his locker area in the maintenance department in that fashion, and that if he was needed he would typically be paged over the telephone.

Marczyszak and Arnson also testified about this incident. Marczyszak testified that he ran into Arnson on one of his morning walk-throughs when Arnson called him over to look at the automated sand controller. As they were just outside the maintenance area, Marczyszak mentioned that he had seen Murphy, another mechanic, earlier in the day, and asked Arnson where Sears was.[35] Arnson reported that Sears had been working on the furnace a little while ago, and Marczyszak suggested going to the maintenance room to try to locate him. When they arrived at the locker room, Marcyzszak pulled back the curtain and saw Sears sitting down with the soda, wearing a white T-shirt, with "a shocked expression of his face." Marczyszak asked Sears when he started and what he had worked on, and Sears responded, telling him that he had been working on the furnace. Marczyszak testified that he asked Sears what he was working on at that point, and Sears responded, "I'm working on getting a soda." Marczyszak asked Sears, "Shouldn't you be working?" and Sears left. Marczyszak confirmed that Arnson had also seen Sears, and said, "You're my witness."[36] Marczyszak then met with Rovello to determine what level of discipline was appropriate.

At the end of the workday, Sears was paged to the conference room, where Marczyszak and Swanhall issued him a written suspension with Barnes present. Marczyszak read the suspension, and Sears said it was ridiculous because he was just getting a drink. Barnes also argued that it was hot at the time, Sears had just worked on the furnace, and the employees should be permitted to get a drink in such circumstances even if it was not breaktime. Sears said that he had only taken a few sips from the can of soda, and had not been sitting for a long period of time. Marczyszak responded that, as he had told Sears before, worktime was for work, and because Sears was not on break, he was abusing time. Marczyszak also told Sears that Sears had not replied when asked what he was working on. Sears was then suspended, and told not to return to work until the following Monday.[37]

Rovello testified that she attended a step 2 meeting regarding Sears' suspension with Swanhall, Barnes, and Sears. According to Rovello, at this meeting Sears said that he was thirsty and drinks soda, not water. Barnes said that Sears needed a drink, because he began work at 4 a.m. and the regular break was not until 9 a.m. Rovello said that the Company was willing to make accommodations in such situations, but that Sears should have gotten permission to take a break from Arnson. Rovello also attended a step 3 meeting with Marczyszak, Swanhall, Leone, Barnes, and Sears. At this meeting, Marczyszak offered to pay Sears for Saturday in order to resolve the grievance, and the Union declined. The Union has moved the grievance to arbitration, and a hearing is being scheduled.

L. Evidence Pertaining to the Complaint's Allegation that Sears was Subjected to More Onerous Working Conditions and Monitoring

Sears contended during his testimony that Marczyszak continued to follow him and question him regarding his activities after he returned from his suspension. Sears testified that Marczyszak frequently came to the maintenance department, and that although he did not question Sears, there was no work-related reason for Marczyszak to be there. Velez also testified that he noticed Marczyszak repeatedly looking for Sears in the maintenance department during the spring of 2012; although Marczyszak could have spoken to Velez or another maintenance employee if some problem needed to be addressed at that time, he did not. Sears testified that on other occasions, typi-

[32] Marczyszak testified that although such a grievance would not be timely, the Company "would consider" waiving its prerogative to challenge the arbitrability of such a grievance on timeliness grounds.

[33] Sears was wearing a T-shirt under his uniform shirt.

[34] Sears testified that he had purchased this stool a few days earlier, and uses it all over the facility.

[35] Arnson testified that Marczyszak was not looking for Sears in particular, but only suggested going through the maintenance room.

[36] Arnson generally corroborated Marczyszak's account, but did not testify that Sears told Marczyszak he was "working on getting a soda." Marczyszak testified that he assumed that "it had to be minutes that [Sears] was in there sitting there," because he and Arnson had not seen Sears on their way to the maintenance room.

[37] Sears testified that he missed 4 days of work—Wednesday, Thursday, Friday, and 9 hours at time and a half on Saturday. Marczyszak confirmed this testimony.

cally between 4 and 7 a.m., Marczyszak questioned him about what he had been doing and what he was working on. Sears also testified that he has observed Marczyszak standing behind machines or pieces of equipment, watching him. Sears testified that on one occasion when he was working on the aluminum furnace, Marczyszak asked Velez where Sears was after having walked by that particular furnace.[38] On several other occasions, Marczyszak entered and exited the boiler room immediately after Sears did. Sears testified that Marczyszak does not question other employees about what they are doing in the same manner that Sears is questioned. Sears testified that around the time that the NLRB issued its initial complaint "things calmed down some," but that Marczyszak had engaged in this behavior during the week prior to Sears' testimony on November 8. Sears testified that, in his opinion, Marczyszak had been monitoring and harassing him consistently since 2009, but that prior to February 3, Marczyszak did not ask him what he was doing on a regular basis.

Marczyszak testified that he has followed the same daily schedule of activities in the plant since April 2008. Marczyszak testified that he typically arrives between 5:30 and 6 a.m., and has a practice of doing "walk-throughs" of the facility several times each day. The first of these walk-throughs usually takes place a little after 6 a.m. During this walk-through, Marczyszak verifies that employees scheduled to work the morning overtime hours are actually present, ensures that machinery is operating or arranges for repairs, and is on the lookout for potential safety issues. Marczyszak testified that he begins from his office, and proceeds to the machine shop, where he checks on the chucker and the CNC machines, and then to the lathes. Marczyszak then visits the foundry finishing area, checks the condition of the backyard outside the facility, and looks into the maintenance area. He then checks the Hunter, an automated molding machine, and visits either the pattern shop area or the furnaces, depending upon what work is being performed. As he walks through the plant, Marczyszak greets the various employees at work as he sees them, and asks for explanations of their work or other information if necessary. Marczyszak testified that he has encountered Sears during these morning walk-throughs "somewhat frequently." Marczyszak testified that the entire process usually takes 10–15 minutes, but can take longer if there are production problems or equipment needing repairs.

Marczyszak testified that at approximately 8 a.m. each day he conducts a scrap review meeting in the quality control conference room, to discuss methods for eliminating unused materials. Afterwards, he returns to his office via the core area, to check on the Hunter machine and the furnaces. Marczyszak tries to do an afternoon walk-through between 1:30 and 2:30 p.m. each day, depending upon his schedule and other events in the facility. Finally, Marczyszak performs a third walk-through after 3:30 p.m., when production ceases for the day, to make sure that all areas are clean and the doors are locked. Three days a week he and other managers review the work schedule in the pattern shop area.

Marczyszak testified that during his walk-throughs he asks Sears what he is doing if he cannot tell what Sears is working on at a particular time. According to Marczyszak, sometimes Sears responds with an explanation, and sometimes he does not. Marczyszak generally denied following or monitoring Sears.

M. The Allegedly Unlawful Work Rules

The complaint alleges that four work rules, or provisions in Respondent's employee handbook, violate Section 8(a)(1) of the Act. Although the IUE apparently contends that the employee handbook does not apply to its bargaining unit employees, Marczyszak testified that Respondent takes the position that the handbook applies to employees in both bargaining units. The evidence does not establish that any employees have been disciplined for violating the allegedly unlawful work rules or handbook provisions. The disputed provisions are as follows:

> 4. PROTECTING GROUP ASSETS
>
> a) The Group recognizes that preserving, protecting and responsibly using company assets including intellectual property is essential to remain competitive and to serve the interests of its shareholders, therefore we must take all appropriate measures to protect these assets and to respect third parties' proprietary information rights.
>
> b) The Group requires all to safeguard and not disclose any knowledge, decision or any information about BURNDY which may in any way prejudice the interests of BURNDY or any confidential information to any party outside BURNDY, unless such disclosure is necessary to enable BURNDY to carry out its business properly and effectively and there is no reason to believe or suspect the information will be missed or improperly disseminated by the recipient; or where it is required by the law whereupon the Legal Department shall be immediately notified prior to any disclosure where possible.
>
> c) The confidentiality obligations of BURNDY'S employees are further subject to specific provisions in their respective employment contracts.
>
> . . . .
>
> DRESS CODE
>
> BURNDY LLC generally allows business casual wear in all of its US facilities. The Company maintains reasonable standards for business attire during regular work hours, and requires each employee to dress in a manner appropriate to his/her job responsibilities. Employees are expected to use good judgment, consider safe practices, and dress appropriately for thier job. For certain positions, the Company may require and provide special attire.
>
> Employees should keep in mind that the Company regularly hosts customers, suppliers and others who are visiting the Company to decide whether or not to do business with BURNDY. In such cases, more formal business attire may be appropriate. The same consideration should be employed if an employee is required to make external visits

[38] Sears testified that Marczyszak would not have been able to see him when he walked by, given the position from which he was working on the furnace.

> The Company reserves the right to address an employee's attire, jewelry, or any aspect of grooming which the Company believes to be unsafe, distracting, unsanitary, not promoting customer good will or the subject of business disruption or complaint.
>
> Specific guidelines for each facility may be obtained from the local Human Resources Representative.
>
> . . . .
>
> PUBLIC STATEMENTS
>
> Due to the importance of communications with the news media, which includes newspapers, trade publications, radio and television stations and any other public medium, inquiries are to be referred to an handled only by or at the direction of the Vice President of Human Resources for BURNDY LLC or the Legal Department or both. This is to ensure that all information about the Company and its business and operations provided to the media is accurate and consistent with the Company's policies. Marketing communications are the responsibility of the designated division of MarCom personnel.
>
> . . . .
>
> GENERAL RULE VIOLATIONS
>
> 6. Soliciting or collecting contributions for any purpose on Company time, except when authorized to do so for Company-sponsored programs (e.g. United Way).

N. Respondent's Refusal to Pay the Cost of Printing an IUE Contract Booklet

Sears, Lochman, Marczyszak, and Rovello testified regarding the 2011 negotiations between the IUE and Respondent, and subsequent discussions regarding whether Respondent would share the cost of printing the IUE 2011–2014 collective-bargaining agreement in booklet form. Sears testified that he had been involved in approximately six of the most recent negotiations for successor IUE collective-bargaining agreements. Sears testified that although the subject of which party would bear the cost of printing up a contract booklet was never discussed during those negotiations, Respondent has paid for the printing of the contract booklet. Sears testified that during the negotiations for the 2011 agreement, the IUE never proposed that Respondent print or pay for the printing of the contract booklet.

Lochman, who acts as Respondent's chief spokesperson during negotiations, Marczyszak, and Rovello testified that during the 2008 and 2011 negotiations with the GMP, the Company eventually agreed to split the cost of printing the GMP contract booklet with the Union. This agreement is reflected in Respondent's last, best, and final offer to the GMP during the 2011 negotiations. However, Lochman, Marczyszak, and Rovello testified that in the 2011 IUE negotiations there was no proposal by the Union for the Company to shoulder or contribute to the cost of printing the contract booklet. Lochman testified that the IUE's attorney, David Cann, made a "take it or leave it" final proposal toward the end of negotiations, which the Company accepted. The IUE's final proposal did not mention anything about printing the contract booklet.

Rovello testified that at the 2008 negotiations between Respondent and the IUE, which she attended, the IUE initially proposed that the Company pay the full cost of printing the collective-bargaining agreement in booklet form. Rovello testified that the parties eventually agreed that each would pay half the cost of doing so.[39]

Following his March 2 meeting with the GMP representatives to discuss their overall collective-bargaining relationship, Lochman conducted a similar meeting with the IUE representatives, which took place on March 27. Sears testified that during the March 27 meeting he attempted to raise an issue involving the still unsigned IUE contract. However, Lochman said that he wanted to discuss that issue later in the meeting, and eventually left the meeting before it could be addressed. After the parties finished discussing three outstanding grievances, Sears handed Marczyszak the unfair labor practice charge alleging that his February 3 discipline, and Rovello's March 7 letter, violated Section 8(a)(1) and (3) of the Act. This charge also alleged that Respondent violated Section 8(a)(5) by refusing to finalize the 2011–2014 contract. The next day, Respondent put together exhibits necessary for the contract to be finalized, and Agramonte, Barnes, and Sears signed it on behalf of the Union.

On April 11, Leone apparently visited Respondent's facility and signed the 2011–2014 IUE contract. Rovello testified that during Leone's visit he asked whether the Company would contribute to the cost of printing a contract booklet. Rovello testified that she responded that the Company was satisfied with a regular paper copy and the subject had not been discussed during negotiations. As a result, the matter was closed. Rovello reiterated this position in an email to Leon dated April 24, which also contended that the IUE's attorney had stated that the Union was satisfied with a regular paper copy of the contract as well.

Sears testified that at the step 3 meeting on May 25 regarding his April 12 discipline, Leone asked Rovello about printing the IUE contract booklet. Leone asked the Company to pay for the printing of the booklet, then offered to split the cost with the Company. Rovello responded that the contract had been in effect for 1-1/2 years, and Respondent did not intend to pay for the printing of booklets at that point.[40] Marczyszak also stated that the Company would not print the IUE contract booklet. According to Marczyszak and Rovello, Rovello told Leone that the parties did not discuss the cost of printing the contract booklet during negotiations, and that negotiations were now closed. When Leone asked whether the Company would agree at that point to pay for half the cost of printing the booklet, Rovello reiterated that negotiations were closed. Leon then asked Marczyszak for a yes or no answer, and Marczyszak said that the Company was not willing to share the cost of printing the contract booklet.[41]

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[39] It is not clear from Sears' testimony whether he attended the 2008 negotiations.

[40] The tentative agreement for the IUE 2011—2014 collective-bargaining agreement had been signed on February 15, 2011.

[41] Marczyszak testified that the IUE had not filed a grievance regarding the Company's refusal to share the costs of printing a contract booklet, and that at this point a grievance would not be timely. However, Marczyszak stated that if the IUE filed a grievance regarding the

III. ANALYSIS AND CONCLUSION

A. Allegations Regarding Unlawful Statements, Surveillance, and Harassment[42]

The complaint alleges that Respondent violated Section 8(a)(1) of the Act beginning in the summer of 2011, when Marczyszak, Arnson, and Butler repeatedly prohibited the GMP officers from discussing union matters on worktime in circumstances where conversation regarding other nonwork-related topics was permissible, threatened them with discipline and unspecified reprisals, surveilled the GMP officers and created the impression that their activities were under surveillance, prohibited them from discussing the terms and conditions of their employment, and harassed them with incessant questioning regarding their interactions. The complaint further alleges that Respondent violated Section 8(a)(1) when Lochman threatened employees with unspecified reprisals on March 2.

I find that the evidence establishes that Marczyszak, Arnson, and Butler unlawfully prohibited the GMP officers from discussing union matters during worktime in situations where conversation regarding other nonwork-related topics was permitted, threatened them with discipline in retaliation for their union activities, and created the impression that their union activity was under surveillance. The evidence further establishes that Arnson and Butler threatened employees with unspecified reprisals, and that Respondent harassed the GMP officers by its managers' conduct. However, the evidence does not establish that Respondent prohibited employees from discussing their terms and conditions of employment, or that Marczyszak threatened employees with unspecified reprisals. The evidence also does not establish that Lochman threatened employees with unspecified reprisals during the March 2 meeting. As a result, I have recommended that these allegations be dismissed.

1. Statements attributed to Marczyszak, Arnson, and Butler

It is well settled that an employer may prohibit discussions regarding union matters "during periods when the employees are supposed to be actively working," if the employees are also prohibited from discussing other subjects "not associated or connected with the employees' work tasks." *Scripps Memorial Hospital Encinitas*, 347 NLRB 52 (2006), quoting *Jensen Enterprises*, 339 NLRB 877, 878 (2003); see also *Sam's Club*, 349 NLRB 1007, 1009 (2007). However, if employees are permitted to discuss other matters unrelated to work during worktime, an employer violates Section 8(a)(1) by prohibiting similar conversation regarding union-related issues. *Sam's Club*, 349 NLRB at 1009; *Scripps Memorial Hospital Encinitas*, 347 NLRB at 52. Generally, in order to determine whether employer communications to employees violate Section 8(a)(1), the Board applies an "objective standard," evaluating "whether the remark tends to interfere with the free exercise of employee rights," without considering "the motivation behind the remark or its actual effect." *Scripps Memorial Hospital Encinitas*, 347 NLRB at 52, quoting *Miller Electric Pump & Plumbing*, 334 NLRB 824 (2001).

The evidence here establishes that Marczyszak, Arnson, and Butler effectively enforced a "no-talk" rule to preclude discussions regarding union activities, even though employees were permitted to discuss other nonwork-related matters on worktime. I credit the testimony of Norton, Velez, Vaast, Domeracki, and Sears that employees routinely discussed nonwork matters on worktime, sometimes stopping their work for a few minutes, without disciplinary repercussions, prior to the summer of 2011.[43] I further credit their testimony that they interacted with supervisors, including Marczyszak, Arnson, and Butler in this manner. Butler confirmed that he discussed nonwork-related issues with Domeracki and Vaast during worktime, and that they were sometimes not actively engaged in work during these conversations. Butler further stated that he has had brief conversations with employees regarding nonwork-related issues in the hallway, or some other area when they are not actively working, during worktime. Marczyszak testified that he has brief nonwork-related conversations with employees upon meeting them on the shop floor, and testified that when such discussions were confined to "a few minutes" they were not objectionable.[44] Although Arnson testified that

matter, Respondent would waive its right to assert an argument that the grievance was not arbitrable because it was not filed in a timely manner.

[42] Respondent contends that the National Labor Relations Board lacked jurisdiction to investigate the charges in this matter, issue the complaint, and prosecute the case, in that the Board lacks a proper quorum pursuant to the opinion of the District of Columbia Circuit in *Noel Canning v. NLRB*, 705 F.3d 490 (2013), holding that the President's recess appointments of Board Members were invalid. The Board has held that because this issue has not been definitively resolved given the conflicting opinions of at least three other circuits, the Board "is charged to fulfill its responsibilities under the Act." See, e.g., *Belgrove Post Acute Care Center*, 359 NLRB 633, 633 (2013), citing *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004); *U.S. v. Woodley*, 751 F.2d 1008 (9th Cir. 1985); *U.S. v. Allocco*, 305 F.2d 704 (2d Cir. 1962). In addition, the Board held after the submission of posthearing briefs in this matter that the authority of the General Counsel to investigate unfair labor practice charges and prosecute complaints is derived from the National Labor Relations Act itself, and not from "any power delegated by the Board." *Bloomingdale's, Inc.*, 359 NLRB 1015 (2013).

[43] The General Counsel argues that because Norton, Hing, Velez, Vaast, Domeracki, and Sears are currently employed by Respondent, their testimony may be considered particularly reliable, in that it is potentially adverse to their own pecuniary interests. *Covanta Bristol, Inc.*, 356 NLRB 246, 253 (2010); *Flexsteel Industries*, 316 NLRB 745 (1995), affd. 83 F.3d 419 (5th Cir. 1996). While I am cognizant of this general principle, I have also taken into account the union officer positions held by some of these employees, as well as demeanor and other factors, in making credibility resolutions. I also note that Vaast and Domeracki testified pursuant to a Subpoena issued by the General Counsel.

[44] Respondent argues that the managers' nonwork-related conversations with employees are irrelevant to a determination as to whether employees were in fact permitted to interrupt their work while discussing nonwork-related matters on worktime. However, the first of the cases cited by Respondent to argue that an employer may enforce policies it has not itself followed involves a presumptively valid rule regarding the distribution of written materials prior to a representation election. *Hale Nani Rehabilitation*, 326 NLRB 335, 336 (1998). The various Board members found that its enforcement against employees was not objectionable, in that it did not create an imbalance in the union

when he saw employees talking he asked them why they were "bothering" one another, it was apparent that he began using this technique after Marczyszak modified his directive to writeup "union guys" who did not appear to be working on the assumption that they were engaged in union business, as discussed below.[45]

In addition, the documentary evidence submitted by Respondent does not establish that prior to the fall of 2011 employees were consistently disciplined for talking to one another during worktime without continuing to physically perform their work. Respondent introduced into evidence what it described as discipline issued to employees for "loafing" dating back to February 2008 (R.S. Exh. 25). However, none of this discipline appears to involve a situation where employees had a brief conversation during worktime. Instead, the disciplined employees were, according to the documents, smoking inside or outside the facility, having coffee or making purchases in the cafeteria, reading a newspaper, or outside the plant for no apparent reason. Although employee Howard Gombert was disciplined on August 6, 2010, for leaving his machine and conversing with other employees, the disciplinary notice indicates that he spoke to a number of employees, visiting the warehouse, the pattern area, and the machine shop, where he had coffee. Similarly, although Christian Feliz was disciplined on April 13, 2011, for talking to Jose Jimenez, it is apparent from Arnson's description of the incident that Feliz became belligerent and interrupted Arnson's subsequent conversation with Hing. The objectionable conduct in these cases therefore encompassed more than a brief conversation with another employee. Finally, although Cavaluzzi and Hing were disciplined on August 17, 2010, for "conducting Union business" in the pattern shop during worktime, there is no specific description of their conduct, and the discipline is therefore not probative as to Respondent's approach to nonwork-related employee conversations during worktime. As a result, the documentary evidence does not tend to establish that, prior to the fall of 2011, Respondent uniformly disciplined employees for discussing nonwork-related issues amongst themselves or with supervisors on worktime, even if they did not continue to actually work throughout the conversation. Given the disciplinary records and the testimony of the employees and managers described previously, the evidence overall does not establish that, prior to 2011, Respondent prohibited all nonwork-related conversations unless the employees involved continued to physically perform work-related tasks.

The evidence further establishes that in the summer of 2011, Marczyszak specifically instructed other managers to alter their approach to employee discussions of nonwork-related issues during worktime, in response to the increased activity and more aggressive positions taken by the new GMP leadership. Marczyszak admitted that after Norton was elected president of the GMP in July 2011 the Union became more energetic and forceful, and that resolving issues was more difficult. Marczyszak also testified that the new GMP leadership, including Norton, appeared to spend more time investigating grievances and preparing for grievance meetings. Marczyszak admitted that as a result, he told Arnson, "[W]henever you see those union guys getting together and they're not working you write them up," and "tell them that I said so" (Tr. 765). Or, as Arnson described it, Marczyszak told him to give the employees a "heads up" that if they were not working, "we're going to assume you're doing union business," and to vigilantly pursue employees' gathering and engaging in conversation (Tr. 1096). I further find that Marczyszak gave a similar instruction to Butler, who testified that Marczyszak directed him during a meeting to look out for employees' abuse of time. As discussed below, Butler testified that as a result of Marczyszak's directive, when he happened to see Hing and the pattern makers together, he told them that they were supposed to be working. Butler stated he used the phrase "union activity" during these conversations. Thus, the evidence establishes that Respondent's other managers confronted employees who held union office regarding their conversations based upon Marczyszak's instruction, which was ultimately engendered by the more aggressive stance with respect to investigation and contract enforcement taken by Norton and the other officers of the GMP.

Turning to the specific statements at issue, I credit Norton's testimony that when he visited Marczyszak's office on July 25, 2011, Marczyszak told him, after some discussion as to whether Norton was late coming back from lunch, that if he was seen talking to Hing or any of the other employee GMP officers, it would be assumed that they were discussing union business, and they would be written up. This was precisely what Marczyszak had directed Arnson to do. Marczyszak's testimony that he told Arnson, "[T]ell them I said so," indicates that he was not reticent about having this particular approach toward the employees' union activities attributed to him personally. As a result, it is quite plausible that after Norton presented him with an unfair labor practice charge (again evincing the GMP leadership's newly aggressive approach), he would confront Norton directly with the warning that he had already instructed his managers to give to the "union guys." Marczyszak's comment to Norton thus constituted an attempt to disparately prohibit employees from discussing union matters during worktime in circumstances where discussion of other nonwork-related topics was allowed, in violation of Section 8(a)(1). *Dial One Hoosier Heating & Air Conditioning Co.*, 351 NLRB 776 fn. 3, 787 (2007); *Scripps Memorial Hospital Encinitas*, 347 NLRB at 52–53. In addition, Marczyszak's statement threatened Norton with discipline in retaliation for union activity. See *Washington Fruit & Produce Co.*, 343 NLRB 1215, 1252–1253 (2004) (supervisor's statement to employees talking amongst themselves that she "did not want them having any union meet-

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and employer's ability to communicate during the preelection period, and the union had other means to communicate its message. *Hale Nani Rehabilitation*, 326 NLRB at 336, 337. This case is therefore not relevant. In the second case, the Board in fact found that the employer violated Sec. 8(a)(1) by excluding nonemployee picketers from its property. *John Ascuaga's Nugget*, 298 NLRB 524, 533 (1990). Although the Board's Decision was reversed by the Ninth Circuit in this respect, *Sparks Nugget, Inc. v. NLRB*, 968 F.2d 991, 998 (1992), the Board Decision is controlling in this context.

[45] Indeed, Arnson testified that although he saw Norton or Hing with a union contract or what he believed to be union documents approximately three times per year, he never told them that they were not permitted to engage in union activities on worktime until the fall of 2011.

ings" in the work area improperly assumed that union activities were being discussed and unlawfully threatened employees with discipline); *Saginaw Control & Engineering, Inc.*, 339 NLRB 541, 558–559 (2003) (supervisor's statements that he had seen employee conversing about what he "assumed was union business" and threats to transfer him or reduce his hours as a result unlawful).

Marczyszak's statement to Norton also created the impression that the union activities of Norton and the other GMP officers were under surveillance by Respondent. In order to determine whether an employer has unlawfully created the impression of surveillance, the Board considers whether, under the relevant circumstances, reasonable employees would interpret the statement at issue as conveying that their union activities were under scrutiny. *Frontier Telephone of Rochester*, 344 NLRB 1270, 1276 (2005), enfd. 181 Fed.Appx. 85 (2d Cir. 2006). Statements indicating an intent to monitor union activity in the future unlawfully create the impression of surveillance. *Golden Stevedoring Co.*, 335 NLRB 410, 416 (2001). I find that Marczyszak's warning that if he saw Norton speaking to Hing or other employees a writeup would ensue based on the assumption that they were engaged in union activity was unlawful this standard. Norton could reasonably conclude from Marczyszak's pronouncement that his interactions with other employees would be subject to heightened managerial observation in the future, and would be presumed to involve the Union. As a result, Marczyszak's statement unlawfully created the impression that Norton's union activities were under surveillance. See *P.S.K. Supermarkets*, 349 NLRB 34, 35 (2007) (manager's statement that she "can always see somebody and who they're talking with" created impression of surveillance); *Saginaw Control & Engineering, Inc.*, 339 NLRB at 558–559 (supervisor created the impression of surveillance by telling employee that "since the election" he had seen the employee speaking to other employees and "assumed" they were discussing "union business on company time").

The evidence establishes that Arnson, pursuant to Marczyszak's instructions, violated Section 8(a)(1) in a similar manner. Arnson admitted that he told Norton that as GMP president he had "a big target on [his] back" if he intended to "start things" or was "stirring things up" (Tr. 1093–1094). As a result, I credit Norton's testimony that on July 5, 2011, Arnson told him that if he was seen talking to Hing or any of the other union representatives, he would be written up based upon the assumption that he was engaged in union activity, because Marczyszak would "come gunning for" him. The evidence also establishes that on multiple occasions in September and October 2011, Arnson told Norton and Hing that if they were seen talking to one another or to the other pattern shop employees, management would assume that "they were talking union business," and they would be written up.[46] I credit Norton and Hing's testimony that, as Arnson also admitted, he repeatedly told them that pursuant to Marczyszak's directive he was to assume that they were engaged in union activity if he saw them talking to one another or to other employees on worktime, and write them up. By making these statements, Arnson prohibited discussions of union matters during worktime when other nonwork-related conversations were permitted, threatened employees with discipline, and created the impression of surveillance.[47]

I further credit Hing's testimony that Arnson interrupted his conversations with Norton after Norton became GMP president, asking them what was going on and telling them, "I hope you're not talking about Union business," and "You know what Ed would do if he seen you talking." These remarks are fully consistent with Arnson's own description of his interactions with Norton, Hing, and the pattern shop employees. I find that they constitute threats of discipline and unspecified reprisals in retaliation for Norton and Hing's union activities, particularly given the reference to "what Ed would do" and Arnson's own previous remarks.

In addition, I credit Norton and Hing's testimony that Arnson continued to interrupt them and ask them what was going on, what they were doing, and why they were in a particular area of the facility, after he stopped explicitly referring to union activity and potential discipline. Arnson admitted that he approached the employees in this manner after being told "in the office . . . not to say that, not to use those words anymore" (Tr. 1099). Although managers are obviously entitled to ensure that the work they are responsible for is being performed by the employees they supervise, Arnson's statements in this context were merely an alternative iteration of his previous attempts to prevent Norton, Hing, and other employees from discussing union issues. Finally, I credit Hing's testimony, again corroborated by Arnson, that Arnson admonished Hing to take a route to the locker room bathroom that did not go through the pattern shop, so that, in Arnson's words, Hing would not be "tempted to stop" and talk to the other GMP officers in the area (Tr. 1103–1104). I find that this constituted another attempt on Arnson's part to prevent the employee GMP officers from discussing union issues in circumstances where talk about other nonwork-related matters was permissible. I therefore conclude that these more subtle attempts to prevent discussion of union matters on Arnson's part likewise constituted disparate enforcement of a "no-talk" rule and created the impression of surveillance of the employees' union activities.

[46] I find any discrepancies between Norton's affidavit and his testimony, or between Norton's testimony and that of Hing, immaterial in light of Arnson's admissions regarding these statements.

[47] *Toma Metals*, 342 NLRB 787 (2004), cited by Respondent to argue that Arnson's statement was not coercive because of his alleged personal relationship with Norton, is inapposite. That case involved an interrogation, not a threat or a statement creating the impression of surveillance, and therefore required consideration of the relationship between the supervisory questioner and the employee. *Toma Metals*, 342 NLRB at 788–789. In addition, the low-level supervisor was related by marriage to the employee he questioned, and the two were personal friends. *Toma Metals*, 342 NLRB at 789. Here, Norton participated in certain sporting events organized by Arnson, but there is no evidence of any family relationship or particular friendship. In *Clinton Electronics Corp.*, 332 NLRB 479, 479–480, 488–489 (2000), by contrast, the low-level supervisor was a "longstanding" friend of the employee she questioned, and the Board nevertheless found an unlawful interrogation. Although the Seventh Circuit reversed the Board on the issue, it is the Board Decision which has precedential import here. *NLRB v. Clinton Electronics Corp.*, 284 F.3d 731 (2002).

I find that Butler made similar statements to Norton and Hing, which violated Section 8(a)(1) of the Act in the same manner. I credit Norton's testimony that in the fall of 2011, Butler repeatedly said that if he discovered Norton or Hing talking to the pattern shop employees, he would assume that they were engaged in union activity and write them up. I further credit Hing's testimony that Butler interrupted him and Cavaluzzi (then a GMP steward), and admonished them against talking about union business. I find that Butler was not a credible witness with respect to this issue, engaging in circumlocution even with Respondent's counsel on direct examination. I do not credit his testimony that he could not recall exactly how he used the term "union activity" when telling Hing and the pattern makers that they were supposed to confine their activities to work during worktime, and could not recall precisely what he said. In fact, Butler's admission that Norton had "always" given him "good reasons to be in the Pattern Shop" when questioned (Tr. 1030), and the undisputed fact that Norton needs to interact with the pattern makers in order for the work in that department to proceed, further establish that his comments were motivated by a desire to prevent union activity.

In addition, I credit Hing's testimony that Butler continued to interrupt his conversations with Norton and the pattern makers by asking them what they were doing in the same manner as did Arnson. As with Arnson, I find that this conduct of Butler's continued, with more politesse, the managers' previous efforts to prevent the GMP officers from discussing union matters on worktime. Because the evidence establishes that Respondent permitted conversation regarding other nonwork-related topics on worktime as described above, Butler's remarks and conduct constituted another unlawful disparate application of a "no-talk" rule. Butler's comments to Norton also constituted a threat of discipline in retaliation for union activity, and statements creating the impression of surveillance. I also find, for the reasons discussed above, that Butler's statement to Hing, "I hope you're not talking about union business," created the impression of surveillance and, in the context of Butler and Arnson's prior explicit threats of discipline, threatened Hing with unspecified reprisals.

For all of the foregoing reasons, the evidence establishes that Respondent violated Section 8(a)(1) of the Act when Marczyszak, Arnson, and Butler: (i) prohibited employees from discussing union matters during worktime in circumstances where discussion of other nonwork-related topics was permitted; (ii) threatened employees with discipline in retaliation for their union activities; and (iii) created the impression that the employees' union activities were under surveillance. The evidence further establishes that Arnson and Butler threatened employees with unspecified reprisals. The evidence does not establish, however, that Marczyszak, Arnson, and Butler prohibited employees from discussing their terms and conditions of employment. Marczyszak, Arnson, and Butler's statements to Norton, Hing, and the pattern shop employees were focused solely on "union business." There is no evidence that these employees were discussing terms and conditions of employment at any of the times that they were admonished by management during July, September, and October 2011, as alleged in the complaint. I therefore decline on the pleadings and record to make a finding that Respondent prohibited employees from discussing terms and conditions of employment. As a result, I shall recommend dismissal of paragraphs 9(e), 10(b), and 11(a) of the complaint. I further find that the evidence does not establish that Marczyszak threatened employees with unspecified reprisals, as opposed to a writeup, and therefore recommend that paragraph 9(a) be dismissed as well.

2. Alleged surveillance and harassment by Marczyszak, Arnson, and Butler

The evidence establishes that Marcyzszak, Arnson, and Butler's repeated threats, statements creating the impression of surveillance, and disparate application of a "no-talk" rule constituted harassment which violated Section 8(a)(1) and (3) of the Act. I find that their insistent chiding of Norton, Hing, and the pattern shop employees regarding talking "union business" when discussion of other topics on worktime was permitted rose to the level of harassment. As discussed above, Arnson and Butler continued this overall pattern of conduct, albeit without specific references to union business or union activity, in asking these employees what was going on, what they were doing, or what they were talking about for a period of time after their initial, explicit references to union activity. There is no evidence that Respondent's managers treated employees who were not union officers in a similar manner; in fact, the evidence establishes that brief nonwork-related conversations on worktime were permitted. I therefore find that by doing so, Respondent discriminatorily harassed the GMP officers, in violation of Section 8(a)(1) and (3) of the Act. See *Laser Tool, Inc.*, 320 NLRB 105, 109–110 (1995).

I do not find, however, that Marczyszak, Arnson, and Butler engaged in surveillance by repeatedly admonishing Norton, Hing, and the pattern shop employees against discussing union business on worktime. There is no evidence that, in the fall of 2011, Respondent's managers altered their activities in order to watch the employees more closely or stationed themselves in specific areas to observe the employees for any length of time. In particular, the evidence establishes that Marczyszak has performed "walk-throughs" of the facility, sometimes accompanied by Arnson, at different points during the day in the same fashion since the inception of his tenure as plant manager. There is no evidence that Marczyszak, Arnson, or Butler changed their routines in the fall of 2011 in order to observe Norton, Hing, or the pattern shop employees more closely. Compare *New Era Cap Co.*, 336 NLRB 526, 533–534 (2001) (supervisor altered conduct to stand close to employee who supported union affiliation "several times a day" when he had previously visited employee's work area once per week, and traversed certain work areas on regular plant walk-throughs "more often" than in the past); *Laser Tool, Inc.*, 320 NLRB at 111–112 (owner hid behind a cabinet near employees' workstations in an apparent attempt to listen to their conversation, and provided no alternative explanation for his behavior at trial). Marczyszak, Arnson, and Butler, as managers, have a responsibility to oversee the work performed in the facility, and to ensure that the employees are productive. In order to fulfill those functions, they must move about the plant to maintain an adequate overview of the work being performed and any prob-

lems which arise. As a result, although their repeated, unprecedented questioning and chiding of the GMP officers regarding conducting union business on worktime was unlawful, the evidence does not establish that they engaged in specific surveillance of the GMP officers. I therefore find that the allegations that Marczyszak, Arnson, and Butler engaged in surveillance have not been substantiated, and will recommend that paragraphs 9(c), 10(d), and 11(e) of the complaint be dismissed.

3. Statements attributed to Lochman

Paragraph 13 of the complaint alleges that Lochman threatened employees with unspecified reprisals in retaliation for their union activities at the March 2 labor management meeting. I find that the evidence overall does not substantiate this allegation. While the account of the March 2 meeting provided by General Counsel's witnesses was sparse and somewhat contradictory, Norton and Hing eventually testified that Lochman said that if the GMP continued the pace of its activities, particularly with respect to the filing of grievances, "they were going to come down hard on us." However, Norton's testimony regarding this meeting was disjointed, and he required significant prompting by counsel in order to provide any context for Lochman's alleged threat of reprisal (Tr. 116–120). Hing's account of Lochman's statements varied. Hing initially testified that Lochman said that if the GMP continued to press grievances, "he was going to come down on us," but then on cross-examination testified that Lochman told the group that Hubbell "had some option or their ideas or something like that . . . they're going to come down on your guys" (Tr. 303, 322). In addition, although Hing discussed the March 2 meeting in his affidavit, he did not mention Lochman's purported threat to "come down on" the GMP or its members at that juncture, only 3 months after the March 2 meeting itself (Tr. 321). Hing insisted at several points in his testimony that Norton did not speak during the March 2 meeting, contrary to Norton's account (Tr. 119, 313–314, 324). Hing also contradicted Norton's testimony that Lochman's threat of reprisal "ended the meeting" (Tr. 117, 323–324). Finally, I note that Don Seal, the GMP representative who arranged for the meeting with Lochman and served as the Union's chief spokesperson, did not testify at the hearing to corroborate Norton and Hing, although he remains employed by the GMP.[48] Overall, the lacunae in the testimony of Norton and Hing, the contradictions between their accounts, and Seal's failure to testify, cast doubt upon the reliability of the General Counsel's evidence regarding Lochman's statements during the March 2 meeting.

The overall context and purpose of the March 2 meeting also militates against a finding that Lochman told the participants that Respondent would "come down hard" on the GMP if the Union continued filing grievances or engaging in other activities. The evidence establishes that the March 2 meeting was arranged between Lochman and Seal in order to address what they both perceived as a deterioration in the overall relationship between Respondent and the GMP. Seal and Lochman, as well as GMP Representative Hector Sanchez, spoke at the meeting regarding the need to repair the collective-bargaining relationship and work together constructively, and expressed their mutual view that the bargaining unit employees enjoyed excellent wages and benefits. The evidence further establishes that immediately after Lochman's remarks the parties were scheduled to discuss a number of outstanding GMP grievances, with a view toward resolving them. I find it improbable that in such a context Lochman would counterproductively threaten the Union with reprisals as alleged. I find it particularly unlikely that Lochman would, as Norton testified, end his remarks in such a manner if the parties were going to immediately proceed to attempt to resolve pending grievances. It is further undisputed that Seal believed that the meeting went well, felt that everyone had the opportunity to present their perspectives, and told Norton that the GMP should focus on moving forward to establish a productive working relationship (Tr. 243–244). In fact, Norton testified that Seal and Lochman both appeared "sincere in their efforts to . . . move forward in a positive way" (Tr. 244). Again, Seal did not testify at the hearing. In the absence of a concrete explanation on his part, I find it difficult to believe that he would express such an opinion had Lochman threatened the GMP with reprisals for filing additional grievances.

In making these assessments, I acknowledge the likelihood of Lochman's frustration with the more aggressive activity of the GMP's new leadership, and with the GMP's activities in pursuing grievances and unfair labor practice charges that Lochman admitted were discussed during the meeting. I further find it entirely possible, given Lochman's agitation during his cross-examination, that he became heated during the meeting, and expressed his dismay at the change in the GMP's relationship with Respondent in a forceful manner.[49] However, the issue is not whether Lochman became discernibly angry, it is whether he expressed himself by telling the GMP representatives that if they continued to file grievances, Respondent would "come down on" the Union. I find that the countervailing evidentiary and pragmatic considerations discussed above ultimately militate convincingly against such a conclusion.

For all of the foregoing reasons, I credit Lochman's testimony, as well as the corroborating testimony of Marczyszak and Rovello, that he did not threaten to "come down on" the GMP during the March 2 labor management meeting. I therefore recommend that paragraph 13 of the complaint be dismissed.

B. Allegations Regarding Retaliatory Discipline, More Onerous Working Conditions, and Monitoring

1. General principles

Under Section 8(a)(3) of the Act, an employer may not discriminate with regard to the hire, tenure, or any term or condition of employment in order to encourage or discourage membership in a labor organization. In order to determine whether an adverse employment action violated the Act in this manner, the Board applies the analysis articulated in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982), approved in *NLRB v. Transporta-*

[48] While I do not find it appropriate to draw an adverse inference based upon Seal's failure to testify and corroborate Norton and Hing's account of the March 2 meeting, I find his failure to do so significant, and have considered it in making my findings.

[49] I note that Norton also became upset while testifying regarding the March 2 meeting (Tr. 116–117).

tion Management Corp., 462 U.S. 393 (1983). To establish unlawful discipline under *Wright Line*, the General Counsel must first prove, by a preponderance of the evidence, that the employee's union sympathies or activities were a substantial or motivating factor in the employer's decision to take action against them. *Manno Electric, Inc*., 321 NLRB 278, 280 (1996). The General Counsel makes a showing of discriminatory motivation by proving the employee's union support or activity, employer knowledge of that activity, and animus against the employee's protected conduct. *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999). Proof of an employer's motive can be based upon direct evidence or can be inferred from circumstantial evidence, based on the record as a whole. *Ronin Shipbuilding*, 330 NLRB 464 (2000); *Robert Orr/Sysco Food Services,* 343 NLRB 1183 (2004).

If the General Counsel is successful, the burden of persuasion then shifts to the employer to show that it would have taken the same action even in the absence of the employee's union support or activities. *Wright Line*, 251 NLRB at 1089; *Septix Waste, Inc*., 346 NLRB 494, 496 (2006); *Williamette Industries*, 341 NLRB 560, 563 (2004). Once the General Counsel has met its initial burden under *Wright Line*, an employer does not satisfy its burden merely by stating a legitimate reason for the action taken, but instead must persuade by a preponderance of the credible evidence that it would have taken the same action in the absence of the protected conduct. *T&J Trucking Co*., 316 NLRB 771 (1995); *Manno Electric, Inc*., 321 NLRB at 280 fn. 12.

2. Disparate application of general rule 9 prohibiting loafing or abuse of time and the General Counsel's prima facie case

I find that the General Counsel has established a prima facie case that the discipline issued to Sears, Velez, and the GMP officers in February, April, and May 2012 was unlawfully motivated. The evidence amply establishes the alleged discriminatees' union activities and Respondent's knowledge. All of the employees disciplined, except Velez, were union officers, and some were engaged in union or protected activity during the incidents for which they were disciplined, such as Sears and Hing on April 12. Norton signed the January 3 letter to upper management regarding the Cessa incident complaining, on behalf of both the GMP and the IUE, about Marczyszak's behavior. On January 31, Region 34 served on Respondent the first complaint in this matter, alleging violations of Section 8(a)(1), (3), and (5) with respect to the GMP. Thus, Respondent was well aware of the union positions held by Sears and the GMP officers, and of their activities on behalf of the respective Unions.[50]

There is also sufficient evidence of animus to support a prima facie case. For example, the timing of the discipline supports an inference that it was unlawfully motivated. It is well settled that an adverse employment action against employees within days of learning of union activity "strongly supports an inference of animus and discriminatory motivation." *Acme Bus Corp.*, 357 NLRB 902, 927 (2011); see also *ManorCare Health Services—Easton*, 356 NLRB 202, 204, 226 (2010), enfd., 661 F.3d 1139 (D.C. Cir. 2011) (discipline of employee "just days" after her first public support for the union indicative of unlawful motivation). Here, the "loafing" discipline imposed upon the union officers began within days of Region 34's issuing the January 31 complaint, and within 2 weeks Sears and the majority of the GMP officers had received initial counselings. Animus is also evident in Marczyszak, Arnson, and Butler's disparate enforcement of Respondent's rules regarding nonwork-related conversations on worktime, threats of discipline and unspecified reprisals, and creation of the impression of surveillance in fall 2011, all of which violated Section 8(a)(1). See *Austal USA, LLC*, 356 NLRB 363, 363–364 (2010) (The 8(a)(1) violations constitute evidence of animus); *Bally's Atlantic City*, 355 NLRB 1319, 1327 (2010), enfd. 646 F.3d 929 (D.C. Cir. 2011). Furthermore, Respondent's conduct in this regard was sufficiently persistent to rise to the level of harassment in violation of Section 8(a)(1) and (3). As discussed above, it is evident from the record that Marczyszak directed Arnson and Butler to target the union officers in response to the GMP's more aggressive approach to contract enforcement after Norton became president.

In addition, as discussed above in section III(A)(1), the evidence does not establish that Respondent had a consistent practice of disciplining employees for speaking to one another during worktime, whether or not rule 9 was explicitly cited. The documentary evidence which Respondent contends establishes an existing practice of discipline for abuse of worktime primarily involves activities outside the plant, such as smoking, or conduct inside the plant other than talking, such as eating or drinking, using a cell phone to talk or for some other purpose, or reading. Rovello testified that she could not recall any additional discipline issued to employees solely for speaking with one another. While Hing and Cavaluzzi received discipline on August 17, 2010, for "conducting union business on work time," there is no information as to what they were actually doing. The two disciplines for talking on worktime, issued to Gombert on August 6, 2010, and Feliz on April 13, 2011, both involve the distinguishing circumstances discussed previously.[51] By contrast, Arnson testified that he observed Norton or Hing with a copy of the GMP contract or union documents during worktime about three times per year, but there apparently was no discipline issued as a result prior to 2012. Therefore, the documentary evidence overall does not establish a consistent practice of issuing discipline to employees simply for conversing with one another, regardless of a citation to general rule 9. This is consistent with the testimony of the employee GMP officers and Sears that they had never heard of two employees being disciplined for such conversations.[52]

[50] Although the evidence does not establish that Sears' signature appears on the January 3 letter, the letter was signed by the president of the IUE, and it is undisputed that Respondent was aware that Sears was an IUE steward.

[51] In Gombert's case, the discipline indicates that he left his machine to roam the plant chatting with employees during worktime, covering the warehouse, pattern area, and machine shop, where he had coffee. The discipline issued to Feliz indicates that he confronted Arnson after being directed to return to his work area.

[52] Sears testified that, in his experience as IUE steward, none of employees in the IUE bargaining unit who speak primarily Spanish had

Finally, the evidence establishes that Respondent altered its disciplinary practice with respect to general rule 9 prohibiting loafing in response to the increased activities of the GMP, in a manner indicative of animus against union activity. In this regard, Rovello's testimony that she began explicitly citing to rule 9 in 2010 is contradicted by the documentary evidence Respondent introduced regarding discipline issued for loafing since 2008 (R.S. Exhs. 25, 28). These documents establish that prior to February 3, Respondent specifically cited rule 9 or "loafing" in only three disciplines issued in 2008—one to Cavaluzzi for reading the newspaper during worktime, one to employee Feliz for washing up 20 minutes early, and one to employee Genao for talking on his cell phone during worktime. There is no pattern of citing to rule 9 or "loafing" which begins in 2010 or 2011, although Respondent issued discipline for engaging in other activities during worktime during those years. In addition, Rovello testified that she began using rule 9 in 2010 in order to include all types of failing to work during worktime in one sequence of progressive discipline, after Hing argued that discipline issued to Cavaluzzi for smoking inside and outside the facility should be treated separately for progressive disciplinary purposes. However, the record contains no evidence that Cavaluzzi was disciplined for smoking anywhere at any time after 2008.[53]

As a result, I find that Rovello's testimony regarding the timing and motivation for the change in Respondent's disciplinary practice regarding citations to general rule 9 is not credible. It is more likely that, as Lochman admitted during his testimony, he directed Rovello to explicitly refer to "loafing" or general rule 9 in disciplinary documentation, "once things got a little bit more confrontational, where we saw the increase in grievances" on the part of the Unions (Tr. 1159–1160). It was also during this period that Marczyszak directed the other supervisors to discipline union officers found conversing amongst themselves or with other employees on the assumption that they were engaged in "union business." Indeed, the two strategies were complementary—while Marczyszak's instruction ensured that union officers would be disciplined more frequently than employees not holding union office or engaged in union activity, Lochman's idea to place all such "infractions" within the same sequence of progressive discipline would result in the imposition of more serious penalties. As a result, the evidence establishes that Respondent deliberately changed its practice in terms of citing general rule 9 in response to the increased activities of the new GMP leadership.

For all of the foregoing reasons, I find that the General Counsel has established a prima facie case that the discipline issued to Sears and the GMP officers in February, April, and May was imposed in retaliation for their union support and activities. I also find that the General Counsel has also established a prima facie case that Respondent selectively applied general rule 9 prohibiting "loafing" to Sears and the GMP officers in the context of the allegedly unlawful discipline. Additional evidence pertaining to Respondent's asserted legitimate, nondiscriminatory reasons for the individual disciplinary actions will be addressed below. Ultimately, I have found that Respondent did not provide evidence sufficient to substantiate its claims that the various disciplinary actions were motivated by legitimate considerations. This finding further supports the overall conclusion that Respondent disparately applied general rule 9 to prohibit union activity, or discussion amongst or with union officers that Respondent's managers believed at the time involved union matters, as alleged in paragraph 16 of the complaint.

3. The February 3 counseling issued to Sears, and Rovello's alleged March 7 threat of retaliation

Respondent asserts that it issued a counseling to Sears on February 3 for "loafing" in violation of general rule 9, which consisted of "having a discussion with a pattern shop employee" during worktime. The evidence establishes that on February 3, during worktime, Marczyszak discovered Sears leaning on a stool talking to Cavaluzzi at Cavaluzzi's workbench.[54] I find that the evidence overall establishes that Respondent issued the February 3 counseling to Sears in retaliation for his union position and activity, and not for any legitimate, nondiscriminatory reason.

The circumstances surrounding the February 3 incident and the counseling support the conclusion that the discipline issued to Sears was part of the newly engineered effort to use general rule 9 to prevent union activity during periods when other nonwork-related conversation was permitted. For example, when Marczyszak saw Sears and Cavaluzzi talking, he did not simply approach them immediately, but walked the entire periphery of the area, watching Sears and Cavaluzzi, prior to confronting them. Marczyszak implausibly denied during his testimony that this was a longer and more roundabout way to reach the pattern shop (Tr. 811). I find Marczyszak's contention that he did so in order to avoid an unpleasant confrontation with Sears similarly incredible given his previously outspoken opposition toward union officers' conversations during worktime. In particular, as discussed above, Marczyszak directed Arnson to inform the union officers that he had personally ordered the managers to issue writeups on the assumption that the union officers were conducting union business if they were discovered conversing on worktime. In addition, both Marczyszak and Sears testified that Sears avoided interacting with Marczyszak, and often left an area if Marczyszak approached him (Tr. 527, 755).

Instead, I find that Marczyszak was purposefully extending his path to the pattern shop in an attempt to catch Sears and Cavaluzzi talking for a sufficiently lengthy period to warrant discipline if their conversation was not work related. Marczyszak testified that any manager could approach an employee seen conversing with another to ask what the employees were doing, as opposed to issuing discipline:

been disciplined for brief conversations, regardless of whether they were actually working at the time.

[53] The evidence establishes that Cavaluzzi was repeatedly disciplined for absenteeism, which was subject to a separate sequence of progressive discipline.

[54] Sears was responding to Cavaluzzi's question about whether he would be paid for his time while attending an upcoming GMP arbitration hearing.

> . . . unless it's something they've seen taking place that's egregious. If I walk [up] to people, and they're briefly talking, and I ask them what they're working [on] and they break up, then they've gone back to work. If on the other hand someone is taking more than just a few minutes and they don't go back to work, then obviously they're loafing and abusing time. [Tr. 797–798.]

According to Marczyszak's testimony, therefore, if an employee who might not be working walked away after being approached, they would have "gone back to work," the problem would be resolved, and no discipline would be necessary. Marczyszak did not pursue this course, however, and his explanations for foregoing it are not credible. Instead, the sequence of events here indicates that Marczyszak was interested in establishing the latter, and refrained from speaking directly to Cavaluzzi and Sears in the hope that they would continue their conversation for a length of time sufficient to warrant disciplinary action. As a result, I find that his actions after discovering Sears in conversation with Cavaluzzi were motivated by a desire to impose discipline.

Regardless of Marczyszak's efforts, however, the evidence ultimately does not establish that Sears ran afoul of Marczyszak's conception of "loafing and abusing time." Marczyszak testified, as described above, that as far as he was concerned, "talking more than just a few minutes" without working constituted "loafing or abuse of time" in violation of general rule 9, but exchanging pleasantries with a coworker or manager for a few minutes was permissible (Tr. 700–701, 797–798). Sears testified that his exchange with Cavaluzzi lasted for about a minute and a half, and that seems a plausible estimate given that the entire interaction consisted of Cavaluzzi's asking him whether he would be paid for his time attending a GMP arbitration, and Sears' response that Ray Dalton had not been paid for his time at an IUE arbitration. However, even if Marczyszak's traversal of the periphery of the area prior to confronting Sears took 3 to 4 minutes, as he claims, Sears and Cavaluzzi would have remained within the bounds of acceptable conversation during worktime given Marczyszak's definition. Furthermore, given the subtlety of Marczyszak's distinction between prohibited "loafing" and permissibly brief nonwork-related conversation, it is odd that the counseling does not specify the amount of time that Marczyszak observed Sears and Cavaluzzi speaking to one another.[55] This is particularly the case given the fact that Marczyszak went out of his way for the sole purpose of observing them for, according to his testimony, several minutes. The failure to determine exactly how long Sears was speaking with Cavaluzzi indicates that Marczyszak was simply interested in disciplining union officers engaged in conversation, regardless of whether their conduct rose to the level of "abusing time."[56] See *Valmont Industries*, 328 NLRB 309, 314 (1999), enf. denied in relevant part 244 F.3d 454 (5th Cir. 2001) (manager's "absence of any precision regarding the length" of employee's allegedly prohibited conversation evidence of an inadequate investigation, and indicative of pretext).

Respondent notes that Cavaluzzi was not disciplined as a result of this incident, because, according to Marczyszak, Cavaluzzi appeared to be working during the conversation with Sears. Respondent argues that Marczyszak's declining to discipline Cavaluzzi indicates that the counseling issued to Sears had a legitimate, nondiscriminatory purpose, and that general rule 9 prohibiting loafing and abuse of time was not applied in a disparate manner. This argument, however, ignores the testimony of Lochman, Marczyszak, and Rovello regarding the rationale for Respondent's changes in disciplinary practices, which strongly indicates that they were engendered by the GMP's increased activities in 2011. In addition, it is well settled that an employer's failure to impose adverse consequences upon every individual involved in union activity does not preclude a finding that the actions it did take were unlawfully motivated. See, e.g., *Alstyle Apparel*, 351 NLRB 1287, 1287–1288,1301 (2007); *Volair Contractors, Inc.*, 341 NLRB 673, 676–677 fn. 17 (2004).

For all of the foregoing reasons, and for the reasons discussed in section III(B)(2), above, the evidence overall establishes that Respondent issued the February 3 counseling to Sears in retaliation for his union activity, in violation of Section 8(a)(3) of the Act, as alleged in paragraph 17 of the complaint.

I further find that Respondent violated Section 8(a)(1) of the Act when Rovello threatened Sears with discipline in her March 7 letter, based upon his conduct at the step 2 meeting regarding his February 3 discipline. Sears testified that at the step 2 meeting he told Rovello while she was questioning him regarding the events at issue, "How many fucking times do I have to tell you that's not what happened," whereas Rovello contended that Sears said to her, "I want to know what you fucking do all day." Even if Rovello's account of Sears' statement is correct, it would not be sufficient to remove Sears' activity during a grievance meeting from the Act's protection under the four factor test articulated in *Atlantic Steel Co.*, 245 NLRB 814 (1979). Sears' outburst took place in a conference room with only Rovello, Swanhall, Sears, and IUE Steward Herman Barnes present, so that it did not undermine managerial authority in front of other employees or disrupt work processes. *Datwyler Rubber & Plastics*, 351 NLRB 669, 670 (2007). The subject matter of the discussion involved a grievance challenging Sears' discipline, clearly militating in favor of protection. The nature of the outburst—in particular the use of the word "fucking"—does not warrant a finding that Sears' activity was unprotected. See *Plaza Auto Center*, 355 NLRB No. 85, slip op. at 2–5 (2010), remanded 664 F.3d 286 (9th Cir. 2011); *Tampa Tribune*, 351 NLRB at 1324–1325 (2007), enf. denied,

[55] Foote prepared the written counseling based upon Marczyszak's account of the incident.

[56] Respondent also argues that Sears' conduct violated art. 27(A) of the IUE contract, which states that IUE members will not "carry on union activities during working hours on the premises of the Employer." I decline to make such a finding or to find a waiver applicable to Sears' conduct based upon this language, as the evidence in fact indicates that union-related conversations during worktime were permitted prior to fall 2011, and are ostensibly still permitted, so long as the employees are working. See also *Danzansky-Goldberg Memorial Chapels*, 264 NLRB 840, 842–843 (1982); *Marco Polo Resort Motel*, 242 NLRB 1288, 1290 (1979), enfd. 617 F.2d 293 (5th Cir. 1980).

560 F.3d 181 (4th Cir. 2009); *Alcoa, Inc.*, 352 NLRB 1222, 1225–1226 (2008). Finally, Sears' outburst was provoked by the February 3 counseling itself, which Respondent issued for unlawful reasons. *Network Dynamics Cabling, Inc.*, 351 NLRB 1423, 1427–1429 (2007). As a result, I find that Sears' statements did not lose the Act's protection under the *Atlantic Steel* analysis, and that Rovello's March 7 threat to discipline him violated Section 8(a)(1) of the Act, as alleged in paragraph 14 of the complaint.

4. The counselings issued to Norton, Domeracki, Cavaluzzi, and Vaast on February 10 and 13

Respondent contends that it issued these counselings for "loafing" in violation of general rule 9 because Rovello observed the GMP officers conducting union business on worktime on February 8. Norton, Domeracki, and Vaast maintained that they were in fact discussing the repair of a pattern. I find that the evidence overall establishes that these counselings were issued in retaliation for the GMP officers' union activity, and that Respondent's asserted reason for the discipline was pretextual.

The evidence establishes that the counselings based upon the February 8 incident, like the February 3 counseling issued to Sears, evinced Respondent's new practice of disciplining union officers found engaging in conversation under the rubric of "loafing" or violating general rule 9. In addition, however, Rovello's actions in connection with the incident itself and the disciplinary process, and the account provided during her testimony, were fundamentally problematic. For example, Rovello initially claimed that she observed the four GMP officers "in this group meeting for a while" before actually speaking to them, but later testified that she took only 20–25 steps from the time she first saw them until the confrontation (Tr. 867, 873). As with the February 3 counseling issued to Sears, there is no mention in the counselings prepared by Rovello of the amount of time that the GMP officers were allegedly engaged in nonwork-related conversation on February 8. In addition, although Rovello initially testified that she saw a GMP contract booklet in Cavaluzzi's drawer and that Norton closed a manila folder as she approached, she eventually admitted that she did not in fact know whether the book she saw was the GMP contract booklet (Tr. 866–867, 970–971).[57] Indeed, none of the counselings Rovello prepared regarding this incident mention the presence of the GMP contract booklet—presumably an important piece of evidence that the GMP officers were not working, but were engaged in union activity at the time she saw them. The omission of this detail is particularly striking given Butler's testimony that Norton needs to visit the pattern shop and speak to its employees on a regular basis to perform his job, and that Norton had always given Butler legitimate explanations for being there when questioned. All of this evidence strongly suggests that Rovello simply assumed based upon the individuals involved—at the time all GMP officers—that they were "having a meeting" regarding union business, and issued counseling to them as a result. Indeed, this is precisely the course of action that Marczyszak had ordered previously.

Certain of Rovello's testimony regarding the disciplinary process and grievance procedure with respect to the February 10 and 13 counselings was similarly unreliable. For example, although Rovello testified that she did not speak to Lochman before issuing the February 10 counseling to Norton, Lochman testified that he "signed off on every counseling" at issue in this matter, including Norton's, and that he would be "very surprised" if Rovello issued a counseling without informing him first (Tr. 877–878, 947, 1172–1174). Rovello also contended that the GMP officers did not assert that they were working on a pattern when she approached them on February 8 until the step 3 grievance meeting sometime after March 30, when in fact the union asserted this defense in its grievance filed on or before February 15 (Tr. 891, 948–951). Rovello's account of the disciplinary and grievance process was therefore contradicted by Lochman's testimony and the documentary evidence, which militates in favor of a conclusion that Respondent's asserted legitimate reason Respondent had for the February 10 and 13 counselings is in fact pretextual.

For all of the foregoing reasons, I find that Respondent has not established by a preponderance of the evidence that the counselings to Norton, Domeracki, Cavaluzzi, and Vaast based upon the February 8 incident were issued for legitimate, nondiscriminatory reasons. I therefore find that Respondent issued these counselings in retaliation for the employees' union activities in violation of Section 8(a)(1) and (3) of the Act, as alleged in paragraphs 18 and 19 of the complaint.

5. The verbal warning issued to Sears and counseling issued to Hing on April 12

The evidence establishes that the April 12 discipline issued to Sears and Hing also involved Respondent's changed practice of treating brief conversations involving union matters as "loafing" in violation of general rule 9. The evidence establishes that on April 12, Sears saw Hing in the old machine shop and noticed a copy of the GMP contract on Hing's forklift. Sears asked to borrow the contract to review the bereavement pay provision, and when it was not open to the page containing the bereavement pay language, stuck it in his back pocket and left. Hing may or may not have spoken during the interaction, but both Sears and Hing testified that the entire exchange lasted a minute or less.

The conduct of Butler, who witnessed this incident, was similar to that of Marczyszak during the February 3 incident involving Sears. Butler testified that he was on his way to the pattern shop when he saw Sears and Hing talking, and heard Sears say, "excused absences." Instead of directly approaching Sears and Hing to determine what was going on, Butler testified that he observed them for "more than a minute," and then proceeded to look for their supervisors. Sears and Hing's testimony regarding the length of the conversation, somewhat shorter than Butler's estimate, is the more plausible given that Hing was operating the forklift at the time in an area containing machinery which creates a noise level of 85 decibels, precluding a

[57] The evidence also establishes that Norton kept job-related paperwork in the manila folder, as well as greeting cards for different life events which other employees signed. However, Rovello provided no explanation as to how she arrived at the conclusion that Norton's shutting the folder was related to union business, as opposed to work-related matters.

protracted discussion. However, even if Butler were credited regarding the length of Sears and Hing's conversation, according to Marczyszak's testimony, "more than a minute" would be within the bounds of acceptable nonwork-related conversation on worktime, even if there is no work actually being performed. In addition, as with the February Sears and pattern shop counselings, the April 12 discipline issued to Sears and Hing for "loafing" in violation of rule 9 contains no mention of precisely how long they were speaking with one another, only that they were discussing "an open booklet" and "nonwork related matters." This indicates that Respondent made no meaningful effort to determine whether the employees were in fact abusing worktime, but simply intended to discipline two union officers found conversing, however briefly, regarding nonwork-related issues. In addition, Marczyszak testified that Butler could have simply approached Sears and Hing to ask what they were doing, potentially a much more efficient means of resolving the matter (Tr. 797–798). Butler's unexplained failure to do so indicates that, again, Respondent's managers were more interested in issuing discipline to the "union guys" than resolving problems in an expedient manner.

For all of the foregoing reasons, the evidence does not substantiate Respondent's contention that it issued the counseling to Hing and the verbal warning to Sears on April 12 for nondiscriminatory reasons. Instead, I find that Sears and Hing were disciplined in retaliation for their union activities, in violation of Section 8(a)(1) and (3) of the Act, as alleged in paragraphs 20 and 21 of the complaint.

6. The counseling issued to Velez on April 13

Respondent contends that Rovello issued a counseling to Velez on April 13 based upon her having observed him speaking with Cavaluzzi regarding nonwork-related topics. There is no dispute that Velez and Cavaluzzi were discussing a baseball game at the time Rovello approached them. In addition, Velez had not been a GMP officer since 1999.

However, the evidence overall establishes that the April 13 counseling was unlawfully motivated. The April 13 counseling was issued one day after the unlawful discipline of Sears and Hing for "loafing" in violation of general rule 9, described above. The circumstances of Velez' counseling are also similar to those involved in the previous counselings issued to Sears, Norton, Domeracki, Vaast, Cavaluzzi, and Hing. In particular, Rovello made no attempt to determine the length of Velez and Cavaluzzi's discussion, but immediately announced that she would be issuing discipline. As with the previous discipline issued pursuant to Respondent's newly implemented practice regarding general rule 9, the counseling does not mention the length of Velez and Cavaluzzi's conversation, and in fact states that when Rovello approached Velez "left the area." This is exactly the scenario that, given the testimony of Marczyszak described above, would *not* warrant disciplinary action.[58] Finally, as discussed above regarding the February 3 counseling issued to Sears, the fact that Cavaluzzi was not disciplined in connection with this incident because he appeared to Rovello to be working does not preclude a finding that Velez' counseling was unlawfully motivated. As a result, for all of the foregoing reasons, I find that the evidence establishes that Velez, was "swept up" in Respondent's disparate and retaliatory prohibition on discussion regarding union matters on worktime and changed practices regarding the application of general rule 9 prohibiting loafing or abuse of time. See *Allstate Power Vac, Inc.*, 357 NRB 344, 346–348 (2011) (knowledge of protected activity and violation established where employee "'caught up' in the unlawful discipline issued to known union adherents"); *McKee Electric Co.*, 349 NLRB 463, 464–465 (2007) (violation established where unaffiliated applicants "'swept into [an] unlawful group' refusal to hire"). As a result, I find that the evidence overall establishes that Respondent violated Section 8(a)(1) and (3) of the Act by issuing the April 13 counseling issued to Velez, as alleged in paragraph 20 of the complaint.

7. The May 3 written warning issued to Sears

Respondent contends that the May 3 written warning it issued to Sears for "loafing or other abuse of time" in violation of general rule 9 was engendered by legitimate, nondiscriminatory considerations, written warning was also based upon the observations of Butler and ultimately Marczyszak, who saw Sears talking to Norton in the pattern storage area. According to Sears, he was on his way to get a drink of water at the fountain near Norton's bench, when Norton invited him to a meeting with an NLRB agent. Sears said that he would be interested in attending if he did not have to work at the time. Sears and Norton testified that this conversation lasted for about a minute or two. Ultimately the evidence establishes that the May 3 written warning was unlawfully motivated.

Butler initially saw Sears and Norton talking, and responded as he did when he observed Sears and Hing together on April 12, that is, instead of confronting them directly he reported to Marczyszak that Sears was "hanging around the pattern storage area . . . not working." Butler did not provide any plausible reason for informing Marczyszak about Sears and Norton's conversation, as opposed to simply approaching them himself, which would be the most direct and efficient manner for dealing with the situation. Marczyszak then testified that he addressed the situation as he did the February 3 incident between Sears and Cavaluzzi—by watching Sears and Norton for "three or four minutes" prior to approaching them and asking Sears whether he was working. Although Sears by all accounts left immediately after Marczyszak confronted him, Marczyszak issued a written warning to him anyway. This course of action is contrary to the interpretation of general rule 9 Marczyszak offered during the testimony quoted above, namely that if "I ask them what they're working [on] and they break up, then they've gone back to work" and no discipline is necessary, whereas a conversation lasting "more than just a few minutes," followed by the employee's refusal to "go back to work," warrants discipline for loafing.

Furthermore, consistent with the previous practice of Respondent's managers, the written warning itself, prepared by Marczyszak, makes no mention of the amount of time that he observed Sears and Norton speaking, although that information

[58] "If I walk [up] to people, and they're briefly talking, and I ask them what they're working [on] and they break up, then they've gone back to work."

is presumably crucial to a determination as to whether or not Sears was "loafing" in violation of general rule 9. In fact, Marczyszak admitted when he testified to observing Sears and Norton conversing for 3 to 4 minutes that he was "adding details" that he "didn't think were important enough to add back in May [2012], when the discipline took place" (Tr. 825–826). Marczyszak's characterization of the length of Sears and Norton's conversation as an unimportant detail at the time of the discipline indicates that the written warning he issued to Sears on May 3 was unlawfully motivated, and not engendered by legitimate concerns regarding the possible violation of general rule 9. See *Valmont Industries*, 328 NLRB at 314 ("post discipline statements" obtained in order to buttress otherwise vague evidence that employee conversation took place on worktime indicate that employer's purportedly legitimate reason for discipline was in fact pretextual).

For all of the foregoing reasons, I find that Respondent has not established by a preponderance of the evidence that the May 3 written warning issued to Sears was motivated by legitimate, nondiscriminatory considerations. I therefore find that the written warning violated Section 8(a)(1) and (3) of the Act, as alleged in paragraph 22 of the complaint.

8. The May 29 suspension of Sears

Respondent claims that Sears was legitimately suspended on May 29 for another incident of "loafing and abuse of time" in violation of general rule 9. Although the incident which formed the basis for Sears' suspension did not involve conversations between or with employee union officers, I find that Respondent failed to substantiate its contention that it suspended Sears for nondiscriminatory reasons.

The evidence establishes that Marczyszak and Arnson discovered Sears sitting in the maintenance area on May 29, drinking a soda. Sears testified that he had just been working on the facility's Morgan furnace, and because he was thirsty he wanted a drink before moving on to his next task. Sears testified, as did Marcyszak and Arnson, that he had also taken off his uniform work shirt due to the effect of the heat of the furnace. Marczyszak and Arnson also confirmed that in response Marczyszak's questions, Sears informed them that he had just been working on the furnace. Marczyszak testified that he assumed that Sears had been "in there sitting" for "minutes" because he and Arnson did not see Sears on their way into the maintenance room. As a result, he suspended Sears for "loafing or other abuse of time" in violation of general rule 9.

The evidence adduced by Respondent simply does not support its assertion that lawful considerations engendered Sears' suspension. For example, the evidence does not establish that Sears' actually having a drink was considered by Respondent to be an offense warranting disciplinary action. For example, Vaast testified that employees are generally permitted to keep beverages in their work areas, as long as they are covered, and Sears was not even in a work area. Rovello testified that she stated during a subsequent grievance meeting that if Sears needed a drink because he was thirsty after working on the furnace, he could have taken time to get one with Arnson's permission. It is entirely plausible that Sears would have become hot and thirsty fixing a furnace, and it is undisputed that when Marczyszak and Arnson discovered him in the maintenance area drinking his soda he had his uniform work shirt off, ostensibly because he needed to cool down.

Furthermore, there are important discrepancies between Marczyszak's testimony and his written accounts of discovering Sears in the maintenance area that cast doubt upon Marczyszak's veracity, and ultimately his intent in issuing the suspension. Marczyszak prepared two documents on May 29 regarding the incident leading to Sears' suspension—a written statement and the suspension letter itself. In his testimony, Marczyszak corroborated Sears' claim that he explained that he had been working on the furnace earlier (thus explaining his thirst and his having removed his uniform shirt). However, Marczyszak's written accounts state that Sears told him that he was "going to fix the furnace," i.e., that he had not yet done so (GC Exhs. 39, 43). More importantly, while Marczyszak's written account and the suspension letter state that Sears said that he had stopped to get a drink of soda, Marczyszak testified that Sears told him in response to the question, "What are you supposed to be working on now?" that he was "working on getting a soda," a substantially more insolent reply (Tr. 749–750). Significantly, Arnson did not corroborate Marczyszak's testimony describing Sears' response as having been phrased in such an impertinent manner (Tr. 1111). Nor did Arnson corroborate Marczyszak's written statement to the effect that he told Marczyszak after seeing Sears, "These guys should know better, it's his own fault" (GC Exh. 43; Tr. 1110–1111). In any event, there is no dispute that after Marczyszak questioned him, Sears immediately left the maintenance area and resumed working, the sort of behavior that Marczyszak testified would ordinarily not warrant discipline. Nor would Sears' having been in the maintenance room for "minutes." In any event, Marczyszak's conclusion regarding the length of time that Sears had been sitting down drinking a soda was based solely on his not having seen Sears while entering the maintenance area. This is not compelling evidence that Sears' May 29 conduct rose to the level of abuse of time.

For all of the foregoing reasons, the evidence does not substantiate Respondent's proffered legitimate, nondiscriminatory reason for suspending Sears on May 29. As a result, the evidence establishes that Sears' suspension was unlawfully motivated, and violated Section 8(a)(1) and (3) of the Act, as alleged in paragraph 23 of the complaint.

9. More onerous working conditions and monitoring of Sears

The evidence establishes that by taking the series of disciplinary actions against Sears on February 3, April 12, and May 3 and 29, Respondent subjected Sears to more onerous working conditions, monitoring and harassment in retaliation for his union activities. As discussed above, the evidence establishes that, at most, one other employee (with the exception of the GMP officers and Velez) was subjected to Respondent's new application of general rule 9 to encompass short conversations between employees. While employee Shinichi Niiyama was disciplined on March 12 for loafing, the disciplinary notice indicates that Niiyama was using his cell phone, an offense which had warranted discipline in the past, and not involved in

a conversation with another employee. As a result, the only discipline supporting Respondent's position is the counseling of Jose Pacheco on January 11 for leaving his workstation at the furnace and talking to another employee. I decline to find an established practice based upon that single event, particularly given the previous incidents of unlawfully motivated discipline and statements violating Section 8(a)(1) established by this record. I further note that Sears, like Norton and Velez, was an employee who had no specific assigned workstation, and moved throughout the plant during the day. In the past, the Board has found violations involving monitoring and harassment of such employees, who as a result of their mobility can engage in union activity encompassing a larger segment of the bargaining unit, than can employees assigned to a specific workstation. See *Valmont Industries*, 328 NLRB at 309–310, 313–314. As a result, I find that the unlawful disciplinary actions described above constitute a pattern of monitoring and harassment imposed upon Sears, in violation of Section 8(a)(1) and (3), as alleged in paragraph 24 of the complaint.[59]

C. Allegations Regarding Unilateral Changes in Violation of Section 8(a)(1) and (5)

1. Applicable legal standards and *Collyer* deferral

Under Section 8(a)(5) of the Act, an employer may not unilaterally institute changes in wages, hours, and other terms and conditions of employment involving mandatory subjects of bargaining without bargaining with the certified representative to impasse or agreement. *NLRB v. Katz*, 369 U.S. 736, 742–743 (1962); *NLRB v. Borg-Warner Corp.,* 356 U.S. 342, 349 (1958). An employer therefore violates Section 8(a)(5) by altering terms and conditions of employment involving mandatory subjects of bargaining without providing the union with notice and the opportunity to bargain. See, e.g., *Southern New England Telephone Co.*, 356 NLRB 338, 345 (2010). The General Counsel establishes a prima facie violation of Section 8(a)(5) by demonstrating that an employer made a material and substantial change in a term or condition of employment constituting a mandatory subject of bargaining, without providing the union with notice and opportunity to bargain. *Success Village Apartments*, 348 NLRB 579, 579–580, 628 (2006), citing *Chemical Workers Local 1 v. Pittsburg Plate Class Co.*, 404 U.S. 157, 159 (1971). The employer must then provide evidence to show that the unilateral change was permissible in some manner. *Success Village Apartments*, 348 NLRB at 628.

Where the complaint alleges that an employer has made unilateral changes in terms and conditions of employment which constituted a past practice, it is the General Counsel's burden to establish the existence of the past practice at issue. *Southern New England Telephone Co.*, 356 NLRB 338, 345; *Exxon Shipping Co.*, 291 NLRB 489, 493 (1988). In order to prove the existence of a past practice, the General Counsel must establish "an activity which has been satisfactorily established by practice or custom" or an "established condition of employment." *Exxon Shipping Co.*, 291 NLRB at 493. The activity in question must occur with sufficient "regularity and frequency" during an "extended period of time" such that it "would reasonably be expected to continue." *Philadelphia Coca-Cola Bottling Co.*, 340 NLRB 349, 353 (2003), enfd. 112 Fed. Appx. 65 (D.C. Cir. 2004).

Respondent argues in its posthearing brief that the allegations regarding unilateral changes should be deferred to the grievance and arbitration procedure contained in the IUE collective-bargaining agreement, pursuant to *Collyer Insulated Wire*, 192 NLRB 837 (1971). Whether deferral to the grievance and arbitration process is appropriate is a "threshold question" which must be decided prior to addressing the merits of the allegations at issue. *Sheet Metal Workers Local 18—Wisconsin*, 359 NLRB 1095, 1096 (2013), quoting *L. E. Myers Co.*, 270 NLRB 1010, 1010 fn. 2 (1984). It is well settled that deferral to arbitration is appropriate where:

> the parties' dispute arises within the confines of a long and productive collective-bargaining relationship; there is no claim of animosity to employees' exercise of Section 7 rights; the parties' agreement provides for arbitration in a broad range of disputes; the parties' arbitration clause clearly encompasses the dispute at issue; the party seeking deferral has asserted its willingness to utilize arbitration to resolve the dispute; and the dispute is well suited to resolution by arbitration.

Sheet Metal Workers Local 18—Wisconsin, 359 NLRB 1095, 1096.

The evidence establishes that the unilateral change allegations here are inappropriate for deferral under this standard. Respondent contends that the alleged unilateral refusal to permit the use of the office copy machine should be deferred based upon the IUE contract's management-rights and zipper clauses (art. 1(G) and art. 31), and based upon article 21(A), which states that "No member of the Union shall carry on union activities during work hours on the premises of the Employer." However, the refusal to permit the use of the office copy machine is part of the written warning issued to Sears on May 3, and is therefore inextricably related to the allegation that Respondent violated Section 8(a)(1) and (3) by having issued it. See *American Commercial Lines*, 291 NLRB 1066, 1069 (1988); *Clarkson Industries*, 312 NLRB 349, 351–352 (1993) (declining to defer allegation regarding retaliatory warning which was "closely related" to alleged violation of Sec. 8(a)(1) which was inappropriate for deferral). In addition, Respondent does not contend that any of the alleged retaliatory discipline

[59] I do not find any violation in this regard based upon Sears and Velez' testimony that Marczyszak looked for Sears or asked him what he was working on when he came upon Sears in the plant. Their testimony was relatively vague, and Sears' testimony revealed the contention in his affidavit that Marczyszak interrupts or actively follows him two or three times per day to be exaggerated (Tr. 593–594). The evidence establishes that Marczyszak, as plant manager, performs several walk throughs of the plant during the course of the day, as he is ultimately responsible for the overall management of the facility and the production process. I do not find any violation in Marczyszak's asking Sears what he is working on during these walk throughs, as that may not be apparent given that Sears' tasks and work areas fluctuate on a daily basis, and knowledge of employee work activities is clearly within Marczyszak's purview as plant manager.

should be deferred to the grievance and arbitration procedure.[60] As a result, deferral of the alleged unilateral refusal to permit employees to use the office copy machine is inappropriate.

I also find it inappropriate to defer the allegation that Respondent violated Section 8(a)(5) by unilaterally refusing to pay the cost of printing the IUE contract booklet. The facts surrounding this allegation are contemporaneous with the facts pertaining to the 8(a)(1) and (3) violations, in that discussions regarding the cost of printing the contract took place during grievance and other labor-management meetings addressed previously. In addition, the *Collyer* standard requires "no claim of employer enmity to the employees' exercise of protected rights," a criterion which is not met in this case given the retaliatory discipline and unlawful statements established by the record. *Clarkson Industries*, 312 NLRB at 350. Finally, the *Collyer* analysis requires an affirmative assertion of the employer's willingness to waive any contention that a grievance would be precluded by the contract as untimely. See, e.g., *Pepsi-Cola Co.*, 330 NLRB 474, 477–478 (2000). Marczyszak's testimony in this regard was a bit equivocal (Tr. 770). For all of the foregoing reasons, I find that deferral of the allegations that Respondent violated Section 8(a)(5) of the Act to the grievance and arbitration procedure is not appropriate in this case.

2. Alleged unilateral refusal to permit IUE representatives to use the office photocopier

The evidence does not establish that Respondent unilaterally refused to permit IUE representatives to use the office photocopier, in that the General Counsel has not met its burden to prove any previous use of the copier by union representatives rising to the level of a legally cognizable past practice. The General Counsel's sole evidence regarding the IUE representatives' previous use of Respondent's office copier was Sears' testimony that he had used the copier for union matters "Whenever I needed to" and "many times" during the course of his nearly 25 years of employment (Tr. 485, 487). However, the only specific example Sears could provide involved copying paperwork for his own work-related injury in December 2011, which is a qualitatively different matter from copying grievances or union related documents (Tr. 486). Even if Sears was copying union related documents at the time, this evidence would be "too remote in time and too intermittent" to establish a past practice binding upon Respondent. See *Exxon Shipping Co.*, 291 NLRB at 493. The evidence also establishes that Sears routinely begins his shift hours before any of Respondent's office personnel start work, allowing him to have used the copier in the past without their knowledge. I therefore credit Rovello's testimony that she never saw Sears use the copy machine (Tr. 927). Although Sears testified that he used the copier many times in front of Rovello's predecessor, Joan Marie Bresnehan, the evidence establishes that Rovello succeeded Bresnehan approximately 6 years ago. Thus, any use of the copier during Bresnehan's tenure would be similarly attenuated, given the complaint's allegation that the unilateral change occurred in 2012 (Tr. 485).

Other evidence also militates against finding a past practice with respect to the use of the office copier for union-related business. The evidence establishes that the IUE had an additional printer in the maintenance department, which was used by Representatives Agramonte and Dalton to print and copy union-related documents (Tr. 533–534, 746). Neither Agramonte nor Dalton testified in order to clarify the circumstances under which this printer was used, or to corroborate Sears' testimony that the IUE representatives used the office copier on a regular basis for union-related purposes. In addition, the evidence indicates that after Marczyszak removed this printer during his initial year of employment with the Company, tool and die maker Louis David used his company computer to print a notice regarding an IUE meeting (Tr. 928; R.S. Exh. 30). David was promptly issued a verbal reprimand for using a company printer for union business (R.S. Exh. 30). Respondent also informed Agramonte in the context of a verbal counseling for the use of the company fax machine for personal business that "[i]f you need to use the Fax for Union purposes, permission needs to be granted" (R.S. Exh. 8).[61] All of this evidence illustrates that Respondent had no established practice of permitting the use of company office equipment for union-related matters.

For all of the foregoing reasons, I find that the General Counsel has not established a past practice of IUE representatives' using Respondent's office copier for union-related purposes.[62] I therefore find that Respondent's prohibiting Sears from doing so in its May 3 written warning did not constitute a change in terms and conditions of employment effected without providing the IUE with notice and the opportunity to bargain. As Respondent did not violate Section 8(a)(1) and (5) of the Act in the manner alleged in paragraph 31 of the complaint, I will recommend that this allegation be dismissed.

3. Alleged unilateral refusal to pay the cost of printing the IUE contract booklet

I similarly find that the General Counsel has not met its burden of proving the existence of a past practice regarding Respondent's contribution to the cost of printing an IUE contract booklet. As a result, Respondent's refusal to do so in 2012 did not constitute an unlawful unilateral change.

Here again, the General Counsel offered solely the testimony of Sears to establish a past practice with respect to Respondent's paying or sharing the cost of printing a contract booklet.

[60] The collective-bargaining agreement's provision prohibiting discrimination, art. 1(F), does not encompass discrimination based upon union activity.

[61] I find the actual discipline issued to Agramonte, and to Domeracki for the use of the fax machine December 2010, to be less compelling than argued by Respondent, as both Agramonte and Domeracki used the fax machine on those occasions for personal, as opposed to union-related, business (R.S. Exhs. 8, 31). Agramonte in particular apparently sent a fax to the Dominican Republic. The evidence does not establish that any of this discipline was the subject of a grievance by the IUE.

[62] Because I find that no past practice has been established and therefore no unilateral change took place, I find it unnecessary to address Respondent's arguments that the IUE waived its right to bargain via art. 31 of the collective-bargaining agreement regarding any change in the use of the office copier, and Respondent's argument that any change was de minimis.

There is no documentary evidence to establish that Respondent has ever shared the cost of printing a booklet. Sears testified that despite the fact that the topic has never been discussed during negotiations, Respondent had always printed the booklet, at its own expense, and distributed it to the bargaining unit employees. However, Sears was vague about the number and time period of the negotiations he actually attended, and was only ultimately certain that he attended the 2011 sessions. Sears also had little knowledge regarding the process culminating in the finalization of the contract after the memorandum of understanding was signed (Tr. 508–522). In fact, Sears' testimony that Respondent funded the entire cost of printing the booklet was less credible than Lochman and Rovello's contention that Respondent paid only half the cost. Although IUE Representative Humberto Leone was apparently involved in the negotiations (one would presume as the Union's chief spokesperson), and dealt with Rovello afterwards in order to finalize the agreement, he was not called to corroborate Sears. In particular, Rovello's email to Leone declining to share the cost of printing a contract booklet states, consistent with her testimony, that "the union's attorney in a response to our attorneys indicated they were comfortable with a paper agreement as well." (R.S. Exh. 32). The General Counsel and the IUE produced no one to refute this contention.[63]

As a result, I credit the more detailed testimony of Lochman, Respondent's chief spokesperson, and Rovello, both of whom contended that during the 2008 negotiations with the IUE, the Union proposed and Respondent ultimately agreed to share the cost of printing a contract book for the bargaining unit employees. I further credit their testimony that no such explicit agreement was reached during the 2011 negotiations, as had occurred during negotiations with the GMP (R.S. Exh. 5). I credit their testimony that as a result Respondent did not acquiesce in Leone's suggestion that Respondent share in the cost of printing the contract booklet after negotiations had concluded.

For all of the foregoing reasons, the General Counsel has not established the existence of a past practice of paying the cost of printing an IUE contract booklet.[64] As a result, its refusal to do so after the 2011 negotiations did not constitute a unilateral change in terms and conditions of employment in violation of Section 8(a)(1) and (5) of the Act. I shall therefore recommend that paragraph 32 of the complaint be dismissed.

D. Policies Allegedly Violating Section 8(a)(1)

1. Applicable legal standards

It is well settled that an employer's maintenance of a work rule which reasonably tends to chill employees' exercise of their Section 7 rights violates Section 8(a)(1) of the Act. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). A particular work rule which does not explicitly restrict Section 7 activity will be found unlawful where the evidence establishes one of the following: (i) employees would "reasonably construe the rule's language" to prohibit Section 7 activity; (ii) the rule was "promulgated in response" to union or protected concerted activity; or (iii) "the rule has been applied to restrict the exercise of Section 7 rights." *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004). The Board has cautioned that rules must be afforded a "reasonable" interpretation, without "reading particular phrases in isolation" or assuming "improper interference with employee rights." *Lutheran Heritage Village-Livonia*, 343 NLRB at 646. Ambiguities in work rules are construed against the party which promulgated them. *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998).

None of the rules at issue here explicitly restrict Section 7 activity, and there is no evidence that they were promulgated in response to union activity or have been applied to restrict the exercise of Section 7 rights. As a result, the sole consideration is whether employees would reasonably construe the language of the rules to prohibit Section 7 activity.

2. Protecting group assets policy

Under pertinent Board law, the protecting group assets policy would not be reasonably construed by employees to restrict Section 7 activity, and the policy therefore does not violate Section 8(a)(1). The Board's analysis of such confidentiality policies has typically turned upon whether or not they explicitly include employee or personnel information. The Board has held that confidentiality policies which explicitly apply to personnel information are impermissibly susceptible to an interpretation restricting employees from protected activities involving their terms and conditions of employment, and therefore violate Section 8(a)(1) of the Act. See, e.g., *DirecTV U.S. DirecTV Holdings, LLC*, 359 NLRB 545, 547 (2013) (rule prohibiting employees from discussing "job," "DIRECTV employees" and "employee records" could be interpreted to prohibit discussion of terms and conditions of employment); *Costco Wholesale Corp.*, 358 NLRB 1100, 1115–1116 (2012) (rule prohibiting the disclosure of confidential information, explicitly defined as including employee names, addresses, and other personal information, overly broad). Confidentiality policies which do not by their terms encompass employee information, however, are not reasonably construed to prohibit Section 7 activity. See *Super K-Mart*, 330 NLRB 263, 263–264 (1999) (rule prohibiting "disclosure" of "Company business and documents" not amenable to an interpretation which would restrict Sec. 7 activity); *Lafayette Park Hotel*, 326 NLRB at 824, 826 (rule prohibiting "Divulging Hotel-private information to employees or other individuals or entities that are not authorized to receive" it not unlawfully restrictive).

Respondent's protecting group assets policy is lawful under this standard. As in *Super K-Mart* and *Lafayette Park Hotel*, the protecting group assets rule does not explicitly encompass employee or personnel information as part of its definition of "confidential information" or "knowledge, decision or any information about" Respondent "which may in any way preju-

[63] I do not find it appropriate to make an adverse inference regarding the existence of a past practice for sharing the cost of printing the contract based upon Leone's failure to testify, however, as there is no evidence in the record as to his participation in negotiations prior to 2011.

[64] Again, because I find that the General Counsel has not established the existence of a past practice which Respondent unilaterally altered, I find it unnecessary to consider Respondent's arguments regarding waiver and the de minimis nature of any change.

dice" Respondent's interest. Furthermore, the context of these specific statements militates against an interpretation that would tend to restrict Section 7 activity. The paragraph of the rule immediately preceding the disputed language states that "preserving, protecting and responsibly using company assets including intellectual property is essential to remain competitive," so that "we must take all appropriate measures to protect them" and "to respect third parties' proprietary information rights." Thus, the disputed language is prefaced by a statement affirming Respondent's "substantial and legitimate interest in maintaining the confidentiality" of its intellectual property and that of its customers and suppliers. *Lafayette Park Hotel*, 326 NLRB at 826; see also *Super K-Mart*, 330 NLRB at 263–264. In this context, the disputed language would more reasonably be understood by employees as applying to intellectual property and other confidential information pertaining to the production process or the products themselves, and not to the terms and conditions of their employment.

The General Counsel contends that the portion of the rule requiring employees to "safeguard and not disclose any knowledge, decision or information . . . which may in any way prejudice the interests of" Respondent would be reasonably interpreted to apply to protected concerted activities involving terms and conditions of employment. However, the Board has in the past rejected an approach which would automatically construe Section 7 or union activity as inimical to an employer's interest. See *Lafayette Park Hotel*, 326 NLRB at 824–826 (declining to find that rule prohibiting conduct "that does not support [employer's] goals and objectives" could reasonably be interpreted to include union activity).

For all of the foregoing reasons, I find that Respondent's protecting group assets policy would not reasonably be interpreted by employees as prohibiting Section 7 activity. I therefore find that Respondent's maintenance of the protecting group assets policy did not violate Section 8(a)(1) of the Act, and will recommend that paragraph 12(a) of the complaint be dismissed.

3. Dress code policy

It is well settled that Section 7 protects the right of employees to wear union insignia in the work place. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); *W San Diego*, 348 NLRB 372, 373 (2006). An employer may restrict employees from wearing union insignia only when justified by "special circumstances," such as when the display of union insignia might "jeopardize employee safety, damage machinery or products, exacerbate employee dissension," "unreasonably interfere with a public image that the employer has established," or impair "decorum and discipline among employees." *Komatsu America Corp.*, 342 NLRB 649, 650 (2004). It is the employer's burden to establish special circumstances which justify a restriction on the display of union insignia. *W San Diego*, 348 NLRB at 373.

Respondent's dress code does not explicitly prohibit the display of union insignia or require special permission when employees wish to wear certain items typically associated with union activity, such as buttons or pins. Nor is there any evidence that Respondent has interpreted the dress code to prohibit employees from wearing union insignia. In fact, the evidence establishes that in November 2008 employees wore red shirts on several occasions pursuant to a Notice posted on the IUE bulletin board in order to express their dissatisfaction with Respondent's management. There is no evidence that any employee was disciplined for violating the dress code as a result of this incident.[65]

The General Counsel nevertheless contends that Respondent's dress code policy violates Section 8(a)(1) because of the statement that Respondent "reserves the right to address an employee's attire, jewelry, or any aspect of grooming" which it "believes to be . . . not promoting customer good will or the subject of business disruption or complaint." The General Counsel argues that the policy is overbroad because this language could be reasonably interpreted by employees as prohibiting the wearing of union insignia. However, the Board has found that similar language in employer policies is not susceptible to an interpretation encompassing Section 7 activities. For example, in *Lafayette Park Hotel*, supra, the Board held that a rule prohibiting unlawful or improper off-duty conduct "which affects the . . . hotel's reputation or good will in the community" did not violate Section 8(a)(1), as the rule would be reasonably interpreted to encompass only "serious misconduct, not conduct protected by the Act." 326 NLRB at 826–827. Similarly, in *Laborers Local 113 (Michels Pipeline Construction),* 338 NLRB 480, 480–481 (2002), the Board held that a rule prohibiting "disruptive" conduct was permissible, in that it would not reasonably restrict the employees' exercise of their Section 7 rights. In these cases, the Board has interpreted such language as pertaining to legitimate business concerns and "serious misconduct," as opposed to protected concerted activity. Given the evidence in the record here establishing that employees have worn clothing to support a particular union initiative without disciplinary repercussions, there is no basis for finding that Respondent's dress code policy would be reasonably interpreted to prohibit the display of union insignia. See, e.g., *Labores Local 113,* 338 NLRB at 481 (rule prohibiting certain off-duty conduct permissible where record contained no evidence that Respondent enforced it against employees for engaging in protected activity); *Lafayette Park Hotel*, 326 NLRB at 827 (same).

This conclusion is further supported by the structure of the dress code policy and the context for the language that the General Counsel contends renders the rule unlawful. The portion of the policy preceding the disputed language repeatedly refers to "reasonable standards for business attire," "appropriate" dress given the employee's responsibilities, and "safe practices." Immediately prior to the language stating that Respondent may "address" attire, jewelry, or grooming not "promoting customer good will or the subject of business disruption or complaint," the rule refers to such aspects of personal appearance which may be "unsafe," "distracting," and "unsanitary." Overall, this

[65] Given the facial neutrality of Respondent's dress code and the lack of evidence that it was disparately enforced, I decline to apply the "special circumstances" test pursuant to *Republic Aviation* and its progeny, as opposed to the work rule analysis articulated in *Lutheran Heritage Village-Livonia*.

context indicates that the dress code policy was engendered by Respondent's legitimate concerns with safety and appropriate business attire, as opposed to precluding employees from exercising their Section 7 rights.

For all of the foregoing reasons, I find that Respondent's dress code policy is not reasonably susceptible to an interpretation which would prohibit employees from displaying union insignia or otherwise engaging in protected activity. I therefore find that the dress code policy did not violate Section 8(a)(1) of the Act, and will recommend that paragraph 12(b) of the complaint be dismissed.

4. Public statements policy

Respondent's Public Statements policy states that inquiries by the public media, such as "newspapers, trade publications" and "radio and television stations" must be "referred to and handled only by or at the direction of the Vice President of Human Resources for BURNDY LLC or the Legal Department or both." I find that this policy would reasonably be interpreted as prohibiting employees from engaging in Section 7 activity, and that Respondent therefore violated Section 8(a)(1) by maintaining it.

It is well settled that employee communications with the news media regarding labor disputes are protected under Section 7 of the Act. *DirecTV U.S. DirecTV Holdings, LLC*, 359 NLRB 545, 545; *Trump Marina Hotel Casino,* 354 NLRB 1027, 1029 (2009), 355 NLRB 585 (2010) (three-member Board), enfd. 435 Fed. Appx. 1 (D.C. Cir. 2011); *Crowne Plaza Hotel*, 352 NLRB 382, 386 fn. 21 (2008). The Board has also held that an employer may not require that employees obtain supervisory or managerial approval prior to engaging in Section 7 activity. *DirecTV U.S. DirecTV Holdings, LLC*, 359 NLRB 545, 546; *Brunswick Corp.*, 282 NLRB 794, 795 (1987). Respondent's Public Statements policy effectively precludes employees from responding to any media inquiries at all, unless specifically directed to do so by management, and therefore runs afoul of these principles. The policy's prohibition against responding to media inquiries is articulated in the context of "the importance of communications with the news media" and the goal of ensuring "that all information about the Company and its business and operations provided to the media is accurate and consistent with the Company's policies." However, these statements of purpose are inadequate to ameliorate the unlawful prohibition against employee communications with the news media that Respondent has not explicitly authorized. See *DirecTV U.S. DirecTV Holdings, LLC*, 359 NLRB 545, 545–546 fn. 4 (unlawful policy ostensibly intended to "ensure the company presents a united, consistent voice to a variety of audiences"). Nor is there any attempt made in the policy to distinguish between activity protected under Section 7 and unprotected communications, such as maliciously false statements. Id., slip op. at 545–546. As a result, Respondent's public statements policy is overbroad, and could reasonably be interpreted by employees as prohibiting activity protected by Section 7 of the Act.

For all of the foregoing reasons, I find that Respondent's maintenance of the public statements policy violated Section 8(a)(1), as alleged in paragraph 12(c) of the complaint.

5. Policy prohibiting solicitation (general rule violations #6)

The General Counsel alleges that Respondent's policy prohibiting solicitation violates Section 8(a)(1) of the Act in that it prohibits solicitation "for any purpose on Company time, except when authorized to do so for Company-sponsored programs." The Board has held that a rule prohibiting solicitation on "company time" is overbroad and presumptively invalid, as it could reasonably be construed as prohibiting solicitation during break times or periods when employees are not actually working. See, e.g., *A.P. Painting & Improvements, Inc.*, 339 NLRB 1206, 1207 (2003); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

Respondent contends that the no-solicitation language quoted above is not unlawful, in that it refers to a statement of the no-solicitation policy contained in its employee handbook which provides as follows:

> Other than that which is approved by the Company, employees may not distribute literature or printed materials of any kind, sell merchandise, solicit financial contributions, or solicit for any other cause during working time. Working time includes the working time of both the employee doing the solicitation or distribution or posting and the employee to whom it is being directed. Furthermore, employees may not distribute non-approved literature or printed material of any kind in working areas at any time. This policy also prohibits non-approved solicitations via the Company's e-mail and other electronic and telephonic communication systems.

Respondent argues that its descriptions of the no-solicitation policy are similar to those found permissible by the Board in *Mediaone of Greater Florida, Inc.*, 340 NLRB 277, 277–278 (2003). In that case, the employer's handbook contained a summary of its policies entitled, "Business Integrity and Ethics Policies at a Glance," which briefly summarized each policy and referred the reader to the specific page containing a statement of the policy in full. *Mediaone of Greater Florida, Inc.*, 340 NLRB at 277. The paraphrased version of the no-solicitation policy—"You may not solicit employees on company property"—was overbroad. However, the complete statement of the policy to which it referred—"You may not solicit another employee in work areas during work time"—complied with the law. Because the brief summary of the no-solicitation policy explicitly referred to the page containing the complete one, the Board found that "a reasonable employee would readily disregard" the unlawful statement of the rule contained in the summary, and would rely on the policy's full, and legally permissible, explication. *Mediaone of Greater Florida, Inc.*, 340 NLRB at 278. As a result, the policy overall was not presumptively invalid. *Mediaone of Greater Florida, Inc.*, 340 NLRB at 277–278.

The employee handbook and general rule violations at issue here, however, are not comparable to the two iterations of the no-solicitation rule at issue in *Mediaone of Greater Florida, Inc.* Here, the presumptively invalid formulation of the no-

solicitation rule is contained not in a summary of policies, but in a list of "General Rule Violations" prefaced by the following statement:

> Any violation of a Company Policy is cause for disciplinary action. The General Rules listed below cover specific infractions for emphasis. Single incidents in violation of a General Rule are cause for disciplinary action. The nature of the discipline will vary depending on the circumstances involved, and in some cases, the immediate termination of an employee's employment may be appropriate.

Furthermore, the general rule violations contain no specific reference directing the reader to any other portion of the employee handbook, as was the case in *Mediaone of Greater Florida, Inc.* As a result, there is no reason for an employee to conclude that the version of Respondent's no-solicitation policy contained elsewhere in the handbook would apply, as opposed to the facially overbroad policy listed as one of the general rule violations. An employee would reasonably interpret the handbook overall as stating that violating the unlawful statement of the policy would result in disciplinary action. I therefore find that *Mediaone of Greater Florida, Inc.* is distinguishable, and that Respondent's no-solicitation policy is presumptively invalid.

Nor has Respondent adduced evidence sufficient to satisfy its burden to show that it "communicated or applied the rule in a way that conveyed a clear intent" to permit solicitation in during nonworking time. See *Teletech Holdings, Inc.*, 333 NLRB 402, 403 (2001) (employer bears the burden to prove that it communicated or applied a presumptively invalid rule in a lawful manner); *Our Way, Inc.*, 268 NLRB 394 (1983). Norton's testimony that he passed around bereavement cards for employees to sign during breaktime hardly establishes that Respondent applied the facially invalid rule in a permissible manner. In fact, Rovello testified that she concluded that Norton was engaged in nonwork-related activity on worktime, and consequently issued the February 10 verbal counseling to him, because he was carrying the manila folder in which he kept these cards. Furthermore, Respondent's contention that the January 3 petition and other documents protesting management's conduct were signed during non worktimes is pure speculation. As a result, I find that Respondent has not presented evidence adequate to substantiate a claim that it actually applied the presumptively invalid no-solicitation policy in a lawful manner.

For all of the foregoing reasons, I find that Respondent's general rule violations #6 constitutes an overly broad rule against solicitation, maintained by Respondent in violation of Section 8(a)(1) of the Act, as alleged in paragraph 12(d) of the complaint.

CONCLUSIONS OF LAW

1. The Respondent, Burndy, LLC, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The GMP and the IUE are labor organizations within the meaning of Section 2(5) of the Act.

3. By disparately enforcing a "no-talk" rule to prohibit discussions involving union matters while permitting discussions of other nonwork-related matters on worktime, Respondent violated Section 8(a)(1) of the Act.

4. By threatening employees with discipline in retaliation for their union activity, Respondent violated Section 8(a)(1) of the Act.

5. By threatening employees with unspecified reprisals in retaliation for their union activity, Respondent violated Section 8(a)(1) of the Act.

6. By creating the impression that employees' union activities were under surveillance, Respondent violated Section 8(a)(1) of the Act.

7. By maintaining an public statements policy which prohibits employees from responding to media inquiries without prior approval and limits the employees authorized to speak to the media, Respondent violated Section 8(a)(1) of the Act.

8. By maintaining general rule violations 6 which prohibits solicitation for any unauthorized purpose on company time, Respondent violated Section 8(a)(1) of the Act.

9. By harassing employees in retaliation for their union activity, Respondent violated Section 8(a)(1) and (3) of the Act.

10. By issuing the following discipline to the named employees on the following dates in retaliation for their union activity, Respondent violated Sections 8(a)(1) and (3) of the Act:

Name	*Discipline*
Robert Sears	February 3, 2012 counseling
Thomas Norton	February 10, 2012 counseling
Daniel Domeracki	February 10, 2012 counseling
Michael Cavaluzzi	February 10, 2012 counseling
Michael Vaast	February 13, 2012 counseling
Robert Sears	April 12, 2012 verbal warning
Robert Hing	April 12, 2012 counseling
Radames Velez	April 13, 2012 counseling
Robert Sears	May 3, 2012 written warning

11. By suspending Robert Sears on May 29, 2012, in retaliation for his union activity, Respondent violated Section 8(a)(1) and (3) of the Act.

12. By disparately applying general rule 9 prohibiting loafing or other abuse of time in retaliation for employees' union activity, Respondent violated Section 8(a)(1) and (3) of the Act.

13. By imposing more onerous working conditions on and monitoring employees in retaliation for their union activity, Respondent violated Section 8(a)(1) and (3) of the Act.

14. Respondent has not violated the Act in any other manner.

15. The above-described unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

THE REMEDY

Having found that Respondent has violated Section 8(a)(1) and (3) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action necessary to effectuate the Act's purposes.

Having found that Respondent violated the Act by suspending Robert Sears, Respondent shall be ordered to make Sears

whole for any loss of earnings he may have suffered as a result of its unlawful conduct, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as set forth in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Respondent shall also be required to remove from its files all references to Sears' unlawful suspension, written warning, verbal warning, and counseling, and to remove from its files all references to the counselings issued to Thomas Norton, Michael Vaast, Daniel Domeracki, Michael Cavaluzzi, Robert Hing, and Radames Velez, and to notify these employees in writing that this has been done and that the discipline shall not be used against them. Finally, Respondent shall be ordered to post a notice, in English and Spanish, informing its employees of its obligations herein.

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, I issue the following recommended[66]

ORDER

The Respondent, Burndy, LLC, Bethel, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Disparately enforcing a "no talk" rule to prohibit discussions involving union matters while permitting discussions of other nonwork-related matters on worktime.

(b) Threatening employees with discipline in retaliation for their union activity.

(c) Threatening employees with unspecified reprisals in retaliation for their union activity.

(d) Creating the impression that employees' union activities are under surveillance.

(e) Maintaining a public statements policy which prohibits employees from responding to media inquiries without prior approval, and limits the employees authorized to speak with the media.

(f) Maintaining general rule violations 6 which prohibits solicitation for any unauthorized purpose on company time.

(g) Harassing employees in retaliation for their union activity.

(h) Disciplining employees in retaliation for their union activity.

(i) Suspending employees in retaliation for their union activity.

(j) Disparately applying general rule 9 prohibiting loafing or other abuse of time in retaliation for employees' union activity.

(k) Imposing more onerous working conditions on and monitoring employees in retaliation for their union activity.

(l) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole with interest Robert Sears for any lost wages he may have suffered as a result of Respondent's unlawful discrimination against him, in the manner set forth in the remedy section of this decision.

(b) Within 14 days of the date of this Order, remove from all files any reference to the following discipline issued to the named employees, and within 3 days thereafter, notify the employees in writing that this has been done and that the discipline will not be used against them in any way:

Name	*Discipline*
Robert Sears	February 3, 2012 counseling
Thomas Norton	February 10, 2012 counseling
Daniel Domeracki	February 10, 2012 counseling
Michael Cavaluzzi	February 10, 2012 counseling
Michael Vaast	February 13, 2012 counseling
Robert Sears	April 12, 2012 verbal warning
Robert Hing	April 12, 2012 counseling
Radames Velez	April 13, 2012 counseling
Robert Sears	May 3, 2012 written warning
Robert Sears	May 29, 2012 suspension

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay, if any, due under the terms of this Order.

(d) Rescind the public statements policy and general rule violations 6.

(e) Furnish all current employees with inserts or amendments to the current employee handbook that (1) advise employees that the unlawful rules have been rescinded, or (2) provide the language of lawful rules; or publish and distribute revised employee handbooks that (1) do not contain the unlawful rules, or (2) provide the language of lawful rules.

(f) Within 14 days after service by the Region, post at the facility at the Bethel, Connecticut, copies of the attached notice marked "Appendix."[67] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site and/or other electronic means if Respondent customarily communicates with its employees by such means. Notices shall be posted and, if pertinent, electronically distributed, in English and Spanish. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other

[66] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[67] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 1, 2011.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated: Washington, DC July 31, 2013

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT suspend you because you engage in activities on behalf of the International Union of Electronic, Electrical, Technical, Salaried and Machine Workers, IUE/CWA Communications Workers of America (IUE).

WE WILL NOT discipline you because you engage in activities on behalf of the IUE or the Glass, Molders, Pottery, Plastics & Allied Workers International Union (GMP).

WE WILL NOT disparately apply our general rule 9 prohibiting loafing or other abuse of time to you in retaliation for your activities on behalf of the IUE or the GMP.

WE WILL NOT impose more onerous working conditions on you or monitor you in retaliation for your activities on behalf of the IUE.

WE WILL NOT harass you in retaliation for your activities on behalf of the IUE.

WE WILL NOT threaten you with discipline in retaliation for your support for or activities on behalf of the GMP.

WE WILL NOT threaten you with unspecified reprisals in retaliation for your support for or activities on behalf of the GMP.

WE WILL NOT create the impression that your activities on behalf of the GMP are under surveillance.

WE WILL NOT apply a rule against talking during worktime to prohibit conversations about the IUE or the GMP, when we permit employees to talk about other nonwork-related matters.

WE WILL NOT maintain a public statements policy which prohibits employees from responding to media inquiries without prior approval, and limits which employees can respond to media inquiries.

WE WILL NOT maintain a general rule violation which prohibits solicitation for any unauthorized purpose on company time.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

WE WILL make Robert Sears whole for any loss of earnings and other benefits suffered as a result of his suspension on May 29, 2012, less any net interim earnings, plus interest compounded daily.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the following discipline issued to the named employees, and within 3 days thereafter, notify them in writing that this has been done and that the discipline will not be used against them in any way:

Robert Sears	February 3, 2012 counseling
Thomas Norton	February 10, 2012 counseling
Daniel Domeracki	February 10, 2012 counseling
Michael Cavaluzzi	February 10, 2012 counseling
Michael Vaast	February 13, 2012 counseling
Robert Sears	April 12, 2012 verbal warning
Robert Hing	April 12, 2012 counseling
Radames Velez	April 13, 2012 counseling
Robert Sears	May 3, 2012 written warning
Robert Sears	May 29, 2012 suspension

WE WILL rescind the public statements policy and general rule violations 6 from the employee handbook.

WE WILL furnish all current employees with inserts or amendments to the current employee handbook that (1) advise employees that the public statements policy and general rule violations 6 have been rescinded, or (2) provide the language of lawful rules; or publish and distribute revised employee handbooks that (1) do not contain the public statements policy and general rule violations 6, or (2) provide the language of lawful rules.

BURNDY, LLC

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/34–CA–065746 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.